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Property and Just Compensation

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FOREWORD

Implementation of the federal plan for an interstate system of controlled access highways has greatly increased the impact of the eminent domain power on landowners. With the increased frequency of condemnation proceedings there must be increased concern with the fairness of the proceedings, both to landowners and the condemning authorities. It has been commonly suspected that diversity among the states of legal standards and rules of compensability and valuation has caused confusion, inefficiency, hardship, and expense in the process of public acquisition of land. This study undertakes to indicate the extent of diversity among the states in the resolution of compensability issues currently litigated, to describe the reasons courts give for their decisions, and to recommend some legislative changes in the law of compensability.

It should be realized that the study is not intended to be a treatise for the law fields with which it deals. Only a sampling of recent court decisions and statutes has been considered, drawn from the study of highway condemnation problems made by Professor Orrin L. Helstad

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of the University of Wisconsin Law School under Contract No. CPR 11-8002 between the University of Wisconsin and the United States Department of Commerce, Bureau of Public Roads. The cases represent all those involving highway condemnation decided in 25 states between 1946 and 1961, plus selected cases from the other states believed to be of particular interest. The result is an analysis of compensability problems litigated during the time period studied. Suggestions for legislative action are summarized at the close of the report.

INTRODUCTION

Definitions of property, at least of real property, relevant to determining that compensation must be paid in eminent domain proceedings are influenced by the historic origins of the common law of realty. It is believed that in the years following the Norman Conquest of England, land served the purpose of money since coins had not yet come into general use. The intricate system of tenures and estates in land, each with its distinct qualities, started to develop in the English courts in response to the need to use land as a means for obtaining goods and services.[1] In such circumstances it was natural that the essence of property was thought to be the right to engage in certain activities on a particular site, and to prevent others from interfering with those activities, rather than the economic value arising from such use rights. Indeed, prior to the development of money as a medium of exchange it could scarcely have been otherwise due to the absence of an efficient yardstick for measuring that value. Through the years that have followed, the law has largely adhered to the idea that "property" in land refers to use rights rather than to the economic value placed upon the rights.[2]

Since the right to engage in each separate activity of the total activities permitted within the particular interest in land owned by the actor is itself a property right, it logically follows that the exercise of eminent domain powers directly over any such one right is a taking of property.[3] Thus if the rights described in the condemnation petition explicity include the right to plant corn, or to park automobiles, or to travel directly by foot or vehicle between land and a public highway it adjoins, a taking of property has occurred for which just com-

1. R. BROWN, CASES AND MATERIALS ON THE LAW OF REAL PROPERTY, Ch. 2, §§ 1-2 (1941).

2. *Id.*, Ch. 1, § 2; L. ORGEL, ORGEL ON VALUATION UNDER EMINENT DOMAIN § 2 (1953).

3. L. ORGEL, ORGEL ON VALUATION UNDER EMINENT DOMAIN § 2 (1953).

pensation must be paid either by money or by replacing the taken rights with other, similar use rights. Where there is no explicit condemnation of a particular right, it being ended instead simply as an incidental consequence of explicity condemning other rights, compensation for the right incidentally ended will have to be paid if the right so ended is thought by the courts to be significant, under the existing circumstances, to the owner. Thus, if land taken for a highway is located in such manner that the land remaining to the owner is not an appropriate site for a restaurant, there has been a compensable taking of restaurant development rights only if it was economically feasible to use the land for a restaurant site before the taking.

Often there is room for different opinions as to whether a given activity is still literally possible to be conducted on a given site, and as to whether it is feasible in economic terms to conduct the activity there. Also, there is some tendency of the courts in hard cases to say that economic consequences to the owner do enter into the determination that property has been taken. With so many variables involved it is to be expected that courts of different states dealing with identical or closely similar fact situations have reached different conclusions as to whether a taking requiring compensation has occurred. However, within each property interest that allegedly has been taken, the different fact situations tend to fall into few types. The discussion that follows analyzes a sampling of the work of the courts from 1946 through 1961 within each property interest according to fact situations, and incorporates revelant statutory material as well. It is hoped by this process that an outline of the practical meaning of just compensation in the law of eminent domain today will emerge.

I. Access Rights

Ownership of land abutting a street or highway carries with it an easement of ingress and egress to and from the highway.[4] This proposition is so well established that reasons for it usually are no longer ad-

4. Blount County v. McPherson, 268 Ala. 133, 105 So. 2d 117 (1958); State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960), *superceding*, 86 Ariz. 263, 344 P.2d 1015 (1959); People *ex rel.* Dep't of Public Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957); Fleming v. State Road Dep't, 157 Fla. 170, 25 So. 2d 373 (1946); Dougherty County v. Hornsby, 213 Ga. 114, 97 S.E.2d 300 (1956); Dep't of Public Works & Bldgs. v. Wolf, 414 Ill. 386, 111 N.E.2d 322 (1953); Hathaway v. Sioux City, 244 Iowa 508, 57 N.W.2d 228 (1953); Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959); Royal Transit, Inc. v. Village of West Milwaukee, 266 Wis. 271, 63 N.W.2d 62 (1954).

vanced in the cases.[5] The courts consider the easement itself to be property,[6] and for that reason have required just compensation to be paid when the easement is taken by eminent domain. Another reason for compensating the loss of access rights is that the loss hinders the use and enjoyment of the tract to which the right pertains and the hindrance is special damage to the tract, not suffered by the general public.[7] Sometimes the two reasons intermesh.[8] The latter approach treats loss of access as a severance of the abutting property, and thus it draws attention to the taking's change in value of the property remaining to the owner. The easement theory perhaps suggests access rights are property distinct from the property in the abutting tract,[9] hence no severance situation arises.

5. The *Riddle* case is an exception. Speaking of the right of the owner of property abutting an existing street to access to and from the street, the court says, "The right is justified upon the grounds of necessity and is such as is reasonably necessary for the enjoyment of the land." Riddle v. State Highway Comm'n, 184 Kan. 603, 610, 339 P.2d 301, 308 (1959).

Commentators agree with the *Riddle* explanation, saying abutters' rights are "based in essence on protection of the reasonable expectations of abutting owners." Kratovil and Harrison, *Eminent Domain—Policy and Concept,* 42 CALIF. L. REV. 596, 643 (1954). The explanation is adopted in R. NETHERTON, CONTROL OF HIGHWAY ACCESS 47 (1963). Dr. Netherton describes the historic origin and basis of abutters' rights in the highway, and points out flaws in a rationale for the rights based either on previously established principles of property or contract. *Id.* at 35-48.

6. Cases cited note 4 *supra;* Mabe v. State *ex rel.* Rich, 83 Idaho 222, 360 P.2d 799 (1961); Anderlik v. Iowa State Highway Comm'n, 240 Iowa 919, 38 N.W.2d 605 (1949).

7. Blount County v. Campbell, 268 Ala. 548, 105 So. 2d 678 (1959); State Highway Dep't v. Irvin, 100 Ga. App. 624, 112 S.E.2d 216 (1959); Clayton County v. Billups Eastern Petroleum Co., 104 Ga. App. 778, 123 S.E.2d 187 (1961). In Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959), no access rights were taken because no highway of any type existed on the land in question, yet the limited access character of the highway to be built was considered in determining severance damages to the land remaining. *See* State Highway Comm'n, v. Burk, 200 Ore. 211, 265 P.2d 783 (1954); State v. Calkins, 50 Wash. 2d 716, 314 P.2d 449 (1957).

8. In Gates v. City of Bloomfield, 243 Iowa 671, 53 N.W.2d 279 (1952) the court declares rights to access, light, air, and view to be property, and that even temporary obstruction of access is a nuisance entitling the owner of abutting land to special damages. The facts of the *Gates* case were that a city ordinance created a bus loading zone, in which area the buses emitted noxious fumes and often remained for an hour at a time. The buses projected over the sidewalk to within two feet of the abutting building; the buses, their passengers, and their luggage blocked ingress to and egress from the building. Sometimes the fumes made the building untenantable. Street traffic was obstructed when the buses were parked. Held, the city was liable in nuisance for special damages suffered by the owner of the abutting improved tract.

9. Mabe v. State *ex rel.* Rich, 83 Idaho 222, 360 P.2d 799 (1961); Nick v. State Highway Comm'n, 13 Wis. 2d 511, 109 N.W.2d 71 (1961).

A. Taking of Access Rights

Access rights may be expressly condemned,[10] in which case normally it is clear a taking has occurred.[11] When there is no express condemnation, the degree of interference with ingress and egress to and from the highway determines whether access rights of adjoining land have been taken.[12] The degree of interference also bears on the value to be placed on access rights determined to have been taken. Examples of the case law of eminent domain pertaining to access rights, classified by typical fact situations, follow.

1. *Existing Road; Encroachment; Service Road Provided*

Where a widening strip for an existing road is acquired at the same time the highway is converted to the limited access type and a service road is constructed by which traffic can go from adjoining land to the lanes of through traffic, access rights have been declared taken.[13] At least one case, however, reached the opposite result,[14] reasoning that access still existed to the service road and from it to the general system of highways.[15] The fact that less traffic passed the property

10. Blount County v. McPherson, 268 Ala. 133, 105 So. 2d 117 (1958); St. Clair County v. Bukacek, 272 Ala. 323, 131 So. 2d 683 (1961); Dep't of Public Works & Bldgs. v. Wolf, 414 Ill. 386, 111 N.E.2d 322 (1953); Smith v. State Highway Comm'n, 185 Kan. 445, 346 P.2d 259 (1959).

11. Smith v. State Highway Comm'n, 185 Kan. 445, 346 P.2d 259 (1959). In that case, had the state not spoken in its petition of acquiring access rights, the access restriction might have been upheld as a police regulation. One situation where no taking occurred arose when a limited access highway was located where no highway of any sort existed before. Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 99 N.W.2d 404 (1959). *Contra,* St. Clair County v. Bukacek, 272 Ala. 323, 131 So. 2d 683 (1961).

12. *See, e.g.,* Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960) where elimination of left turns into and out of owner's property as result of building concrete island in the middle of the street to divide the traffic was held an insufficient interference with access to amount to a taking.

13. Blount County v. McPherson, 268 Ala. 133, 105 So. 2d 117 (1958); State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960), *superceding,* 86 Ariz. 263, 344 P.2d 1015 (1959); State *ex rel.* Morrison v. Wall, 87 Ariz. 327, 350 P.2d 993 (1960); People *ex rel.* Dep't of Public Works v. Murray, 172 Cal. App. 2d 219, 342 P.2d 485 (1959); State v. Fox, 53 Wash. 2d 216, 332 P.2d 943 (1958).

14. State Highway Comm'n v. Bingham, 231 Ark. 934, 333 S.W.2d 728 (1960).

15. People *ex rel.* Dep't of Public Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957) may have used similar reasoning in denying compensation. In the *Russell* case a county road abutted the subject property; across and adjoining the county road from the property was a parkway and ditch; and adjoining these was a state highway. The street intersecting the county road at the end of the block in which the property lay also entered the state highway. Then land was taken from the owner on which the county road was relocated at the original grade, with the original width, and with unlimited access rights between the road and the property.

on the service road than had passed when the property had direct access to the main travelled highway was treated as indicating diversion of traffic rather than impairment of access. Also, where an owner previously had given up access rights to all but 20 of his 300 feet of frontage, condemning the access rights of the 20 and substituting a service road that would adjoin the owner's land created no obligation to pay money damages, even though it was not specified where the service road would join the throughway.[16] The court stated without elaboration that the new access right would be as good or better than the existing one.[17]

Jury verdicts of impaired access were upheld in situations where the points at which the service road connected with the main travelled highway were appreciable distances from the tract whose access was in question. Motorists seeking to go to the tract had to be alert for the service road entrance for a considerable distance from the tract and were forced to go appreciably out of their way after leaving the tract to travel along the main highway in a particular direction. Thus, in one case,[18] traffic desiring to go to the tract would either have to enter the service road 1300 or 1400 feet from the site, or would first have to travel about one mile from the site and then double back to the service road entrance previously mentioned, depending on the direction from which the traffic came. Leaving the site, traffic would either travel along the service road 1900 feet to an entrance to the through traffic lanes, or, after going 250 or 300 feet along the service road, would turn, drive under the through lanes, turn again and travel in the opposite direction on the opposite service road 1400 or 1500 feet to an entrance to the throughway. Only one-way traffic was allowed on the service roads. In another case[19] the entrance to the service road was about 2600 feet from the tract involved. Two-way traffic was al-

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At the same time the grade of the state highway was raised, thereby eliminating the entrance of the intersecting street into the state highway. No compensation was required for the elimination. No substantial impairment of access to the county road was found, obstructions beyond the first intersection from the property not being protected against by access rights. The county was held to have discretion to determine the particular road purposes of the right of way, and using the parking as a traffic divider was a valid police regulation.

16. People *ex rel.* Dep't of Public Works v. Schultz Co., 123 Cal. App. 2d 925, 268 P.2d 117 (1954).

17. *Id.* at 938, 268 P.2d at 126.

18. State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960), *superceding,* 86 Ariz. 263, 344 P.2d 1015 (1959).

19. People *ex rel.* Dep't of Public Works v. Murray, 172 Cal. App. 2d 219, 342 P.2d 485 (1959).

lowed on the service road and the entrance could be used by traffic travelling in either direction on the main highway. It is believed, however, that it is the deprivation of direct access to the main stream of traffic travelling in one direction that constitutes the taking, rather than the degree of difficulty in going between the tract and the main highway.[20]

2. *Existing Road; Service Road provided no Encroachment*

Where an existing roadway becomes the service road for limited access lanes constructed parallel to it, compensation for loss of access is not always paid. Dictum in one case[21] asserts in such circumstances that no access was taken of lands abutting the outside of the old highway. The reason given is that the ability to pass between the original highway and the land has not been affected.[22] The state will not be enjoined from moving a highway route about a mile and half and converting it to the limited access type where the old highway is maintained as an ordinary street.[23] The court declared the owners of tracts abutting the old highway had not been deprived of access, apparently also thinking of the ability to pass between the highway and the land; the smaller number of vehicles passing the tract demonstrated diversion of traffic rather than loss of access.[24] Damages also have been denied,[25] on the basis that the state has no duty to send traffic past a tract. Retention of the old street was sufficient to avoid a taking of access in a highway relocation situation even when the old street was closed immediately beyond the first intersection from the subject tract

20. People *ex rel.* Dep't of Public Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960). *See also* Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264, 299 P.2d 347 (1956) where the tract was originally on the corner of two streets. A freeway outlet into one of the streets then was built to intervene between the tract and the second street, a concrete wall nine inches high and 300 feet long dividing the outlet from the said second street. Held, access was impaired; the freeway outlet was not a service road because it did not connect at both ends with a street passing the site.

21. State *ex rel.* Morrison v. Thelberg, 87 Ariz. 318, 350 P.2d 988 (1960), *superceding,* 86 Ariz. 263, 344 P.2d 1015 (1959).

22. *Id.* at 325, 350 P.2d at 992.

23. Halloway v. Purcell, 35 Cal. 2d 220, 217 P.2d 665, *cert. denied,* 340 U.S. 883 (1950).

24. *Id.* at 230, 217 P.2d at 671-72.

25. Jahoda v. State Road Dep't, 106 So. 2d 870 (Fla. App. 1958). In this case some land was taken and severance damages paid, but damages for loss of access were not allowed.

and traffic could not pass directly from the new to the old highway.[26] The court stated that the right of access does not extend beyond the intersection at either end of the block in which the tract is located.[27] The fact that the tract could only be approached by the cross streets at the ends of the block was an inconvenience the owner suffered as a member of the public. The opinion contains language asserting that severance of the area comprising the tract must occur, and an improvement must be constructed on the land taken, before access loss may be compensated.[28] Although the dictum that encroachment is a prerequisite to compensation for access loss may be questioned, the result of the case is defensible since the street where the tract abutted was not a through street in the first place. A similar result has been reached by similar reasoning where the route to a parking lot from a through street was made more circuituous by building a retaining wall across a side street into which the parking lot opened, the wall being built where the street intersected the main street.[29] The court in this case observed that access rights are subordinate to the public right to enjoy the street and to have the street improved more fully for public convenience and necessity.[30]

However, allegations that an existing, four-lane highway was converted to the limited access type by creating a depression between the opposing lanes of traffic, building one fence in the depression and another fence between the main highway and the service road which was completed to serve the subject gasoline station, stated a cause of

26. Rosenthal v. City of Los Angeles, 193 Cal. App. 2d 29, 13 Cal. Rptr. 824 (1961). Where there was no cross street and the old street was closed just beyond subject property which was improved as a restaurant, access was held to be taken and compensation required. Mabe v. State *ex rel.* Rich, 83 Idaho 222, 360 P.2d 799 (1961).

27. Language limiting access rights to the nearest intersection also appears in People *ex rel.* Dep't of Public Works v. Russell, 48 Cal. 2d 189, 309 P.2d 10 (1957).

28. Rosenthal v. City of Los Angeles, 193 Cal. App. 2d 29, 13 Cal. Rptr. 824 (1961).

29. Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956).

30. The reason also appears in Little v. Burleigh County, 82 N.W.2d 603 (N.D. 1957). In the *Little* case the landowner had an access road on an embankment. The embankment caused a creek to wash out a culvert in the highway, which resulted in relocating the highway in such a place as to destroy the access road. Compensation was denied. The court said access had not been denied because the county provided two other access roads, and that an owner cannot insist on access at any point he wishes since the access right is subject to the state's right to improve and control the highway.

action for damages for lost access.[31] Additional allegations were that the openings to the service road were 960 feet and 1246 feet from the service station. In spite of these allegations of curtailed access, the court said only that it could not be held as a matter of law that no substantial access impairment had occurred;[32] apparently a jury still might find no impairment. Where a highway passed for three miles through a farm, cutting it in two, and was then converted to the limited access type with service roads, compensation was allowed,[33] but one suspects more for severing the farm than for loss of access. The discussion in the opinion focuses on the ability of the owner to cross the highway, not to use it for travel to other points, and on the inability to work the farm as one unit.[34] Although it was the taking of access rights that made the crossing impossible, the serious consequence considered was the severance of the tract. Cases denying compensation for loss of access were distinguished on the ground that they involved land lying on only one side of the highway,[35] which furthers the impression that severance, not loss of access, was the real harm compensated. The right to cross the highway had not been taken when the right of way was first acquired as an easement, since there was then no authority to build a limited access road.[36]

Another case allowed compensation when access was cut off by the physical improvement made in the highway rather than by converting the road to limited access.[37] Certain residential properties abutted an ordinary highway, virtually, at a grade, near the intersection of the highway with a railroad. An embankment was then constructed on the old highway on the side opposite the properties, by which the

31. Clayton County v. Billups Eastern Petroleum Co., 104 Ga. App. 778, 123 S.E.2d 187 (1961).

32. *Id.* at 783, 123 S.E.2d at 190.

33. Arkansas State Highway Comm'n v. Union Planters Nat'l Bank, 231 Ark. 907, 333 S.W.2d 904, *rehearing*, 232 Ark. 200, 334 S.W.2d 879 (1960).

34. The two nearest interchanges with the service roads were, respectively, about one-half mile from the north and south boundaries of the plantation. Additional buildings and machinery were required to operate the plantation as two rather than one farm. *Id.* at 910, 333 S.W.2d at 907.

35. *Id.* at 912, 333 S.W.2d at 908.

36. *Id.* at 911, 333 S.W.2d at 907. The opinion does not explain why severance is a compensable harm, assuming that conclusion instead. Dissenting judges agreed severance must be compensated but thought damages already had been paid since the Highway Department's intention to build a highway that could be crossed only at designated points had been considered when the right of way had first been taken as an easement. *Id.* at 916-17, 333 S.W.2d at 910.

37. Anderlik v. Iowa State Highway Comm'n, 240 Iowa 919, 38 N.W.2d 605 (1949).

new highway would cross the railroad on an overpass. The embankment was higher than the old highway by 24.12 feet, 19.5 feet, and 14.5 feet in turn where it fronted the respective residences. Each home faced the embankment and was set back from it by 43, 71 and 80 feet respectively. The embankment was as high as the first house, as high as the chimney of the second house, and in the third house one could see over the embankment from the upstairs but not from the downstairs. There was testimony that the embankment made the houses darker and shut off breeze. The old highway was retained to provide access to the houses but was blocked at the railroad tract and converted from blacktop to light gravel with plans to surface it with crushed rock. The old road may have been narrower after the improvement than before.[38] The distance to the new main highway was 779 feet from the first house, 569 feet from the second, and 399 feet from the third. Under the above circumstances, the court held that mandamus lay to compel the Highway Commission to institute condemnation proceedings to assess damages for loss of access, light, air and view. The basis of the decision was that the above attributes were property that had been taken and for which taking the state constitution required just compensation to be made.[39]

It is impossible to say whether the fact that light, air, and view were lost influenced the court in determining that damages were due the landowners. A similar mingling of these factors with loss of access by physical obstructions resulted in the court three years later invalidating a city ordinance enacted under the police power.[40]

3. Existing Road; no Service Road; no Encroachment

Access may be eliminated by structures placed within the right of way of an existing road, by vacating the road, or by acquiring the access rights as such. Where structures are used, the courts have often held that no taking requiring compensation occurred.[41] Several rea-

38. The landowners testified the travelled portion of the old highway after the improvement measured from 8 to 14 feet wide in front of their properties; the Highway Department testified the width was 15 to 21 feet. Before the improvements the old road was 66 feet wide but the opinion does not indicate whether this represented the travelled portion. *Id.* at 920, 922, 38 N.W.2d at 606-07.

39. *Id.* at 922, 38 N.W.2d at 607.

40. Gates v. City of Bloomfield, 243 Iowa 671, 53 N.W.2d 279 (1952).

41. People *ex rel.* Dep't of Public Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960); People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951); Holman v. State, 97 Cal. App. 2d 237, 217 P.2d 448 (1950); Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956); State Highway Dep't v. Har-

sons have been advanced, among them that the center strip, curb, or other barrier was placed within the right of way to promote safety and was done pursuant to the police power,[42] or that access rights are subordinate to the public right to use the street and to have the street improved to serve the public convenience and necessity so long as no physical invasion of abutting land occurs.[43] Another reason suggested is that the cost of compensation would be prohibitively high to the government.[44] Language sometimes suggest the highways are state property which the state is empowered to manage for highway purposes as it chooses, so long as it does so in a reasonable manner.[45] Protection of travellers on the highway from roadside activities outside[46] or inside[47] the right of way is another recognized justification

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ris, 213 Ga. 790, 102 S.E.2d 7 (1958); State Highway Dep't v. Strickland, 213 Ga. 785, 102 S.E.2d 3 (1958); Johnson v. Burke County, 101 Ga. App. 747, 115 S.E.2d 484 (1960); Dougherty County v. Hornsby, 94 Ga. App. 689, 96 S.E.2d 326, *aff'd in part*, 213 Ga. 114, 97 S.E.2d 300 (1956) (curb along 405 foot frontage with only three entrances, each 20 feet wide, property being site of drive-in restaurant and trailer court); Dep't of Public Works & Bldgs. v. Maddox, 21 Ill. 2d 489, 173 N.E.2d 448 (1961); Blank v. Iowa State Highway Comm'n, 252 Iowa 1158, 109 N.W.2d 713 (1961); Wilson v. Iowa State Highway Comm'n, 249 Iowa 994, 90 N.W.2d 161 (1958); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960); State v. Fox, 53 Wash. 2d 216, 332 P.2d 943 (1958).

42. People v. Sayig, 101 Cal. App. 2d 890, 226 P.2d 702 (1951) (center-island, U-turn possible 500 to 1000 feet from subject property); Holman v. State, 97 Cal. App. 2d 237, 217 P.2d 448 (1950) (raised center strip, gaps at ends of block); State Highway Dep't v. Strickland, 213 Ga. 785, 102 S.E.2d 3 (1953) (curbs with 30-foot openings for entrance and exit); Dep't of Public Works & Bldgs. v. Maddox, 21 Ill. 2d 489, 173 N.E.2d 448 (1961) (median strip 6 inches high fronting gas station); Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960); State v. Fox, 53 Wash. 2d 216, 332 P.2d 943 (1958).

43. Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956). A parking lot opened on a side street, which, at the end of the block in which the parking lot was located, opened on a through street. The through street was being widened and a bridge was being replaced. In connection with the work, a retaining wall was built across the side street where it had opened on the through street.

44. Springville Banking Co. v. Burton, 10 Utah 2d 100, 349 P.2d 157 (1960).

45. "The management and control of the state system of roads is vested in the State Highway Board. [Ga.] Code (Ann.) § 95-1606. A court of equity will not interfere with the discretionary action of the State Highway Department in locating, grading, or improving a state-aid highway, within the area of their legally designated powers, unless such action is arbitrary and amounts to an abuse of their discretion." State Highway Dep't v. Strickland, 213 Ga. 785, 786-87, 102 S.E.2d 3, 5 (1958).

46. "[T]he curbs . . . will prevent trucks from backing up to the loading platform from the paved street, in that they will . . . not . . . leave any room for a truck or trailer to extend into the right of way while loading or unloading. The evidence . . . shows that . . . the purpose of the [curb is] to protect the travelling

for access elimination under the police power. More a conclusion than a reason, the statement sometimes appears in cases where access has not been entirely eliminated, but where, in fact, convenient access to the property remains, that abutting owners are not entitled as against the public to access at all points in the boundary between the land and the highway.[48] However, each distinct land use must have its own access to the highway even when adjoining uses are on land of a common owner.[49] Where the land was used as a truck stop consisting of a gas station, cafe and dormitory, two entries to the gas station, each 34 feet wide, provided reasonable access if the openings were at least 50 feet apart, which was the maximum legal length for trucks.[50] The fact that no physical invasion was involved has also been advanced as a reason for concluding that no taking occurred.[51]

Occasionally a taking is found and compensation paid when a barrier within the right of way wipes out access.[52] And the highway department has been enjoined to build connections between a highway and abutting streets in a subdivision.[53] A rectangular tract of land abutted one street and extended so far back from it that a parallel street ran into and ended at one side of the tract. The occupant of the tract held the fee simple title from the abutting street to a line extended from the center line of the parallel street, and leased an additional strip extending 30 feet from the center line and completely crossing the tract. The first intersection of the parallel street from the

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public and to prevent private enterprise from using the public right of way in a manner that endangers the public in its use of the highway." *Id.* at 790, 102 S.E.2d at 7.

47. Johnson v. Burke County, 101 Ga. App. 747, 115 S.E.2d 484 (1960) (Servicing cars in roadway. Probably no access existed in the first place since one could not go into the property without going over gasoline pumps and concrete island the owner has installed, which island adjoined the right of way.)

48. State Highway Dep't v. Strickland, 213 Ga. 785, 787, 102 S.E.2d 3, 5 (1958); Wilson v. Iowa State Highway Comm'n, 249 Iowa 994, 90 N.W.2d 161 (1958); Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957).

49. Iowa State Highway Comm'n, v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957).

50. *Id.*

51. Blank v. Iowa State Highway Comm'n, 252 Iowa 1128, 109 N.W.2d 713 (1961).

52. Royal Transit, Inc. v. Village of West Milwaukee, 266 Wis. 271, 63 N.W.2d 62 (1954); Tillotson v. Windsor Heights, 249 Iowa 684, 87 N.W.2d 21 (1957) (highway grade lowered three feet).

53. Fleming v. State Road Dep't, 157 Fla. 170, 25 So. 2d 373 (1946). The barrier in this case appears to have been the highway grade.

tract was with a traffic artery. The occupant used the entire tract as a truck terminal but entering and departing trucks used only the parallel street for access. The city completely barricaded the end of the parallel street where it ran into the tract. The court held that access rights pertain to the ownership or occupancy of land located at the end of a street just as though the land were located at the side, that a lessee receives their benefit as party of the lease, that barricading the street prohibited access rather than regulated it and that, therefore, it could not be sustained under the police power.[54]

A landowner's allegations that his tract had 405 feet of frontage on a highway, that the tract was the site of a drive-in restaurant and trailer court and that the state installed a curb in front of the property eight inches high stated a cause of action valid against a general demurrer.[55] Another tract that figured in litigation[56] fronted a highway for 754 feet. Of this frontage 287 feet at one end was zoned residential but was used for pasture and growing corn. The remaining 467 feet was zoned commercial and had two buildings on it. One was a combination gas station, restaurant and truck garage; the other a law office, residence and dormitory for twenty truckers. The highway was converted to limited access and four driveway openings were provided the owner, three being each 34 feet wide and for commercial use. Of the three, two were to the gas station and one was to the diesel pumps and office building. The fourth driveway opening was only 18 feet wide and was the only one allocated to the residential zone. A fifth driveway, already present when the highway was made limited access, remained undisturbed, apparently giving access to the gas station.[57] The court held[58] it to be a jury question as to whether the

54. Royal Transit, Inc. v. Village of West Milwaukee, 266 Wis. 271, 277, 63 N.W.2d 62, 64-65 (1954).

55. Dougherty County v. Hornsby, 94 Ga. App. 689, 96 S.E.2d 326, *aff'd in part*, 213 Ga. 114, 97 S.E.2d 300 (1956). Further allegations that three driveway entrances each 20 feet wide were left in the curb and that a median strip forced traffic in one direction to go 50 yards beyond the tract, make a U-turn and return to enter the tract did not state a cause of action. It is not known whether damages were for access loss.

56. Wilson v. Iowa State Highway Comm'n, 249 Iowa 994, 90 N.W.2d 161 (1958).

57. "[T]here is a fifth entrance to the property from Avenue Hubbell which is not disturbed. Traffic on Hubbell from the northeast may turn to the left across Hubbell at its intersection with Forty-second Street and there enter the property alongside the filling station." *Id.* at 1004, 90 N.W.2d at 167.

It is unclear whether the entrance described is the fifth one or one of the other four.

58. *Id.* at 1005, 90 N.W.2d at 168.

single curb opening afforded a reasonable access to the residential zone, allowing the curtailment of access to be sustained under the police power.

Compensation has been required when access was not provided for each separate possible land use on a single tract. The owner of a tract having 228 feet of frontage located his home 15 feet from the east property line. The house was 140 feet from the west property line. Access was limited to one opening 18 feet wide located only seven feet from the east property line. The land from the existing house to the west line could be used for another residence and was so zoned. The court held that access to the 140 feet west of the existing home had been destroyed and required compensation.[59]

Where a road dedicated to public use is vacated, compensation for loss of access rights has been paid[60] even when the street was never improved or used by the public.[61] The reason for compensating when no road has been built is obscure. Apparently the access easement is thought to arise when a plat showing a street is accepted by the public authorities. Vacating the street extinguishes the easement, which is acknowledged property requiring compensation. Where a road existing on the land was vacated, the court reasoned that use and enjoyment of abutting land was hindered, the hindrance was special damage not suffered by the general public and hence, compensable as consequential damage to the remaining property.[62] Circuity of travel to neighbors, market and towns, forced by the vacation, could be considered in determining the decreased market value of the abutting land. Occasionally courts go so far as to allow a jury to compensate for loss of indirect access to a highway on which the owner's land did not abut.[63] In one such case[64] a secondary road was closed that had passed

59. Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957). The *Wilson* case, 249 Iowa 994, 90 N.W.2d 161 (1958), is another example of requiring separate access for each separate land use on a single tract.

60. Talley v. Wallace, 252 Ala. 96, 39 So. 2d 672 (1949); State Highway Dep't v. Irvin, 100 Ga. App. 624, 112 S.E.2d 216 (1959).

61. Talley v. Wallace, 252 Ala. 96, 39 So. 2d 672 (1949).

62. State Highway Dep't v. Irvin, 100 Ga. App. 624, 112 S.E.2d 216 (1959).

63. Blount County v. Campbell, 268 Ala. 548, 109 So. 2d 678 (1959); Dougherty County v. Long, 93 Ga. App. 212, 91 S.E.2d 198 (1956) (Lot adjoined a street that abutted another street which in turn ran at right angles to the new highway. The new highway crossed the last described street on an overpass, whereas the old highway had intersected it at grade. Held, a cause of action was stated for loss of access, the obstruction being located within one block of the lot.) *Contra,* Schneider v. State, 38 Cal. 2d 439, 241 P.2d 1 (1952) where an intersecting street was closed by a physical barrier; McDonald v. State, 130 Cal. App. 2d 793,

by the land and crossed the highway. The court reasoned that closing the road was a partial taking and the reduced accessibility was one factor affecting the value of the remaining land.

An owner of land that did not abut the vacated part of a street was denied compensation where a cul-de-sac was avoided by opening a new street to a parallel street one block away and travel distances from the subject property remained virtually unchanged.[65] In such a fact situation it would seem easy to conclude no access rights of the landowner had been taken. But the court talks of the failure of property values to decline, which suggests a taking occurred but caused no economic loss.

Elimination of access rights by governmental action not involving barriers usually requires compensation,[66] but other times does not.[67] One clear reason for the different results is that sometimes the lost access rights are valueless or replaced in kind. However, statutes showing legislative intent to compensate are frequently found in the cases requiring compensation but not in the others.

Relegating a drive-in theater to access by secondary roads at right angles with the highway, converted to limited access, on which the

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279 P.2d 777 (1955) where the travelled portions of a city street and of a state highway adjoined yet no loss of access to the state highway was found when a concrete wall four feet high was built separating the street from the highway and reducing the street width from 40 to 29 feet. The wall ended at the ends of the block in which the claimants' land, which adjoined the street, was located and street traffic could enter the highway at these points. Also there was no allegation that traffic could not move in both directions on the street after the wall was built. Still, the holding was that the owner of land adjoining the street had no access rights to the highway in the first place, not that they were not substantially impaired by the wall.

64. Blount County v. Campbell, 268 Ala. 548, 109 So. 2d 678 (1959).

65. Constantine v. City of Sunnyvale, 91 Cal. App. 2d 278, 204 P.2d 922 (1949).

66. Heckendorf v. Town of Littleton, 132 Colo. 108, 286 P.2d 615 (1955) (annual town fee for making curb cuts upset as taking access without just compensation); Boxberger v. State Highway Comm'n, 126 Colo. 526, 251 P.2d 920 (1952); Florida State Turnpike Authority v. Anhoco Corp., 107 So. 2d 51 (Fla. App. 1958), *modified,* 116 So. 2d 8 (Fla. 1959); Pure Oil Co. v. City of Northlake, 10 Ill. 2d 241, 140 N.E.2d 289 (1957); Smith v. State Highway Comm'n, 185 Kan. 445, 346 P.2d 259 (1959); State Roads Comm'n v. Jones, 241 Md. 246, 216 A.2d 563 (1966); Hartung v. Milwaukee County, 2 Wis. 2d 269, 86 N.W.2d 475 (1957).

67. People v. Al G. Smith Co., 86 Cal. App. 2d 308, 194 P.2d 750 (1948); Chicago Nat'l Bank v. Chicago Heights, 14 Ill. 2d 135, 150 N.E.2d 827 (1958); Dep't of Public Works & Bldgs. v. Filkins, 411 Ill. 304, 104 N.E.2d 214 (1952); Nick v. State Highway Comm'n, 13 Wis. 2d 511, 109 N.W.2d 71 (1961).

theater fronted was held to require compensation.[68] The court relied on a state statute authorizing acquisition of "property rights for limited access facilities . . . including rights of access,"[69] and concluded the legislature intended compensation should be paid.[70] Yet the court also said, "the right of access is not being regulated but is being destroyed,"[71] that the relegation of the landowner to access by secondary roads "cannot be summarily done."[72] The case was relied on by the Maryland court in construing statutory language that the State Roads Commission "may by agreement or condemnation" restrict, limit, or close rights of access to mean "must" accomplish these ends by agreement or condemnation.[73] In another case[74] city ordinances restricted heavy trucks from using any route from an unrestricted street to a quarry surrounded by residential development. A state statute[75] gave abutters the right to use the street and prohibited the city from materially interfering with its usefulness as a street. The court held the ordinances could not be applied so as to prevent the trucks from reaching the quarry. Although the result can be explained simply as the enforcement of the statute, the court also declared access rights include the use of streets between the subject property and an unrestricted thoroughfare.[76] This suggests that denying such use infringes access rights and takes property for which the constitution requires compensation be paid. A town ordinance imposing an annual fee on abutting owners for making curb cuts was held invalid, the court saying access rights are property that cannot be taken without payment of just compensation.[77] The court did not discuss whether

68. Florida State Turnpike Authority v. Anhoco Corp., 116 So. 2d 8 (Fla. 1959).

69. FLA. STAT. § 338.04 (1955). A similar statute was involved in Boxberger v. State Highway Comm'n, 126 Colo. 526, 251 P.2d 920 (1952).

70. Florida State Turnpike Authority v. Anhoco Corp., 116 So. 2d 8, 14 (Fla. 1959).

71. *Id.*

72. *Id.* A dissenting opinion takes the view that no compensation for denying access was required unless the highway was diverted from proper highway purposes. Forcing the owner to use the secondary roads to obtain access to the highway was simply regulating the right of access to the highway; consistent with denying owners of abutting land to enter the highway wherever they please. *Id.* at 15.

73. State Roads Comm'n v. Jones, 241 Md. 246, 252, 259, 216 A.2d 563, 566, 570 (1966).

74. Hartung v. Milwaukee County, 2 Wis. 2d 269, 86 N.W.2d 475 (1957).

75. WIS. STAT. § 80.47 (1957).

76. 2 Wis. 2d 269, 278-79, 86 N.W.2d 475, 481 (1957).

77. Heckendorf v. Town of Littleton, 132 Colo. 108, 286 P.2d 615 (1955).

the fee could be justified as a regulation of access rights. No statute aided the conclusion; the holding rests entirely on constitutional grounds. An ordinance forbidding any driveway to a public street to be established without permission of the city council, the ordinance establishing no standards for approval of proposed driveways, was also invalidated as a taking without just compensation.[78]

No compensation was required where, prior to condemning the access rights, the abutting land was used for farming and a borrow pit lay between the farm and the highway over which three driveways passed, and after the condemnation, three access openings, each 30 feet wide, were left to the abutting owner.[79] Access rights were recognized as property for which compensation must be paid when taken, but under the facts the three new access openings afforded as good access as the owner had ever had. Similarly, no compensation was required when an existing highway was converted to limited access where prior to the conversion the highway could be entered from abutting farm land only by steep inclines traversable only by a tractor or wagon, not by a combine, hayrack or other machine.[80] The highway authorities agreed to provide all weather access entrances for all agricultural and residential purposes. A jury determination that under these facts access not only was not harmed but was improved was sustained. One case held access rights could be validly extinguished under the police power where no land area was taken if the landowner could reach the highway by a more circuitous route.[81] The opinion of the court does not articulate its reasoning. However a concurring opinion viewed the access right to be only one in the bundle of rights pertaining to realty and analogized the situation to that of land use zoning where no taking is found when the owner retains beneficial uses. If by reason of service road or prior existing connecting road reasonable access remained, no compensation was required.[82] Another case, although holding compensation necessary, implies the curtailment of access that occurred might have been sustained as a police regulation had the state not alleged throughout its petition that it was acquiring the access rights.[83] Limiting use of part of a street to pedestrians and

78. Pure Oil Co. v. City of Northlake, 10 Ill. 2d 241, 140 N.E.2d 289 (1957).
79. People v. Al G. Smith Co., 86 Cal. App. 2d 308, 194 P.2d 750 (1948).
80. Dep't of Public Works & Bldgs. v. Filkins, 411 Ill. 304, 104 N.E.2d 214 (1961).
81. Nick v. State Highway Comm'n, 13 Wis. 2d 511, 109 N.W.2d 71 (1961).
82. *Id.* at 517-18, 109 N.W.2d at 74.
83. Smith v. State Highway Comm'n, 185 Kan. 445, 346 P.2d 259 (1959). In this case the landowner had 2633 feet of frontage, access rights to 1410 feet

emergency vehicles only was a reasonable police regulation, therefore valid, where unlimited use of the street resulted in dangerous traffic conditions.[84]

4. *Existing Road; Encroachment; no Service Road*

Taking land area from an owner whose tract adjoins an existing road, while at the same time converting the road to a limited access facility without relocating it or providing service roads is a taking of access for which the courts require compensation,[85] even when the access is taken through negligence of the workers, constructing the road.[86] The courts have had no difficulty in finding a compensable taking, speaking of the vested right of access, and almost automatically conclude that payment must be made for it.[87] In a fact situation identical except that no limited access highway was created, a California court found a 38 per cent reduction in frontage, from 122.66 feet to 76.03 feet, substantially impaired access as a matter of law.[88] No consideration was given to the principle that access rights do not include the right to go on the highway from every foot of the adjoining land.

5. *Existing Road relocated; old Roadway abandoned*

Relocating of an existing road may result in the new right of way crossing the tract that adjoined the old highway or it may not. The sampling of cases on which this study is based[89] include no decision involving the latter situation;[90] in the former, the decisions go both

of which were acquired. A frontage road was to be located along the part of the tract where access rights were not acquired; the new highway was to be located 75 feet from the land; and a pre-existing entrance between the land and the highway, located in the midst of the part of the frontage where access rights were acquired, was to be preserved. The land was on the edge of a small city and was suitable for platting into one-acre tracts for commercial purposes.

84. Chicago Nat'l Bank v. Chicago Heights, 14 Ill. 2d 135, 150 N.E.2d 827 (1958).

85. State v. McDonald, 88 Ariz. 1, 352 P.2d 343 (1960); Blumenstein v. City of Long Beach, 143 Cal. App. 2d 264, 299 P.2d 347 (1956); People v. Loop, 127 Cal. App. 2d 786, 274 P.2d 885 (1954); Cleveland Boat Service v. City of Cleveland, 102 Ohio App. 255, 130 N.E.2d 421 (1955), *aff'd*, 165 Ohio St. 429, 136 N.E.2d 274 (1956).

86. Cleveland Boat Service v. City of Cleveland, 102 Ohio App. 255, 130 N.E.2d 421 (1955).

87. State v. McDonald, 88 Ariz. 1, 352 P.2d 343 (1960).

88. People v. Loop, 127 Cal. App. 2d 786, 274 P.2d 885 (1954).

89. *See* text preceeding note 1 *supra*.

90. Jahoda v. State Road Dep't, 106 So. 2d 870 (Fla. App. 1958) fits the facts except the old highway remained in use as a secondary road. In denying the owner compensation for loss in value of the land caused by diverting the traffic,

ways.[91] The court requiring compensation considered diversion of traffic one of the effects of the project on the value of the remainder left to the landowner; in denying compensation another court acknowledged the project lowered the value of the remainder, but since in its state limitation of access was achieved by the police power no compensation was necessary.[92]

6. *Limited access Highway built where no sort of Highway previously existed, Owner of Land through which Highway is to pass Claims Loss of Access*

Only one decision among the cases sampled considered access rights taken and required payment.[93] The rest found no access rights existed in the first place and hence no taking was possible.[94] Reasons for finding no access rights existed to be taken include the lack of two tracts in separate ownership before condemnation[95]—a prerequisite for the existence of an easement—and state intention that the landowner not have access rights since the purpose of a limited access highway is to serve traffic rather than land.[96] The decision finding loss of access when a limited access highway was built where none had previously existed is not persuasive, especially outside the state where rendered. It is based on a combination of state constitutional and statutory provisions peculiar to its state, resort to technicality, and confusion

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the court remarked that the state has no duty to any person to send traffic past his door, that there is no vested right to have a public highway maintained in a particular place.

Pike County v. Whittington, 263 Ala. 47, 81 So. 2d 288 (1955), although itself a case where the new right of way crossed the tract adjoining the old highway, implies that no compensation would be paid if there was no such crossing. In requiring compensation the majority emphasizes that the crossing—a partial taking—occurred, and a dissenting opinion interprets the court's opinion to limit compensation to partial taking situations.

91. Compensation: Pike County v. Whittington, 263 Ala. 47, 81 So. 2d 288 (1955). No Compensation: Cullum v. Van Buren County, 223 Ark. 525, 267 S.W.2d 14 (1954); Carazella v. State, 269 Wis. 593, 70 N.W.2d 208 (1955), *rev'd*, 71 N.W.2d 276.

92. Carazella v. State, 269 Wis. 593, 70 N.W.2d 208 (1955).

93. St. Clair County v. Bukacek, 272 Ala. 323, 131 So. 2d 683 (1961).

94. People v. Thomas, 108 Cal. App. 2d 832, 239 P.2d 914 (1952); Lehman v. Iowa State Highway Comm'n, 251 Iowa 77, 99 N.W.2d 404 (1959); Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959); State Highway Comm'n v. Burk, 200 Ore. 211, 265 P.2d 783 (1954); State v. Calkins, 50 Wash. 2d 716, 314 P.2d 449 (1957); State v. McDonald, 88 Ariz. 1, 12, 352 P.2d 343, 350 (1960) (dictum).

95. State Highway Comm'n v. Burk, 200 Ore. 211, 265 P.2d 783 (1954).

96. *Id.;* State v. Calkins, 50 Wash. 2d 716, 314 P.2d 449 (1957).

with severance damage. The state constitution required just compensation for property "taken, injured or destroyed by the construction or enlargements of its works, highways, or improvements," whereas other states just required compensation for property taken by condemnation, which indicated to the court a more liberal requirement of compensation than existed in other states. A statute required consideration of enhancement to value of remaining lands caused by a new highway, in fixing the owner's compensation. From this the court inferred a legislative intent that damage to access rights also be considered, even when the access could not exist until after the highway was completed, since benefits to the land also could not occur until after the highway was built. The condemnation petition filed in this particular case listed access rights in the description of property to be condemned, which, the court asserted, was evidence the access rights must exist even before the road was built. From thinking of loss of access as a separate element of damage, the court shifted to view it as an aspect of severance, observing that the more complete severance achieved by a limited access highway is to be considered in determining the value of the remaining land after the take. The last mentioned reason did not support the holding of the case, however, for instead of allowing access loss as an element of severance damages, it allowed the jury to consider access loss as a separate element of damages in fixing just compensation.[97]

7. *Limited Access Highway built where no Highway previously existed; Owner of Land that will not adjoin the New Highway claims Loss of Access*

Compensation was denied in the one case[98] found in the sample which involved the situation of the subtitle. A farm consisted of two tracts a quarter-mile apart, connected by a secondary road. The tracts were used as one. A limited access highway was built between the tracts but crossed neither, and the secondary road was closed. Thereafter the owner would have to travel over three miles between tracts,

97. *See* St. Clair County v. Bukacek, 272 Ala. 323, 131 So. 2d 683 (1961). A dissenting opinion would have denied separate damages for loss of access rights because no access easement existed to be taken, denying access where none previously existed could not affect the value of the land before and after the improvement, and the more complete severance effected by a limited access highway would be reflected in the severance damages.

98. Warren v. Iowa State Highway Comm'n, 250 Iowa 473, 93 N.W.2d 60 (1958).

crossing a mainline railroad twice, the limited access highway once, and travelling along a busy highway much of the way. It was no longer feasible to farm the two tracts as one. In finding no compensation requirement the court was impressed with the expense to the state of paying all those inconvenienced by closing direct ways they formerly used. Access to the abutting secondary road and to the general highway system is the same as ever. The harm suffered by the owner is the same suffered by the general public but in different degree, hence there is no special damage. The court analogizes the situation to that of the merchant cut off from prospective customers by making a street "one-way," dividing it or relocating it. Considering the farmer virtually was put out of business by loss of use of one tract, it is hard to think the court really believed its analogies to the harm suffered by the general public and by the merchant on a street subject to traffic regulations. Relocating the street is more analogous, since it might close the merchant's store. It seems more probable, however, the decision was prompted by fear of the costs to the state to require compensation where no land of the claimant had been taken.

8. *Miscellaneous*

When a street was rendered unusable because of subsidence caused by excavation for a public construction project compensation for loss of access was required.[99] Although the street had to be closed, the reason for the decision was not the vacation but the interference of the subsidence with the property right the owner enjoyed of ingress and egress between the adjoining land and the street. Where access was lost only for four months while certain highway improvements were made, compensation was denied, the loss being held a personal deprivation to the owner rather than a taking of property.[100]

B. Summary

Judging from the sampling of cases analyzed, whether access rights have been taken in the constitutional sense depends in large part on the way access is eliminated. If a widening strip for an existing road

99. Hathaway v. Sioux City, 244 Iowa 508, 57 N.W.2d 228 (1953).

100. Blank v. Iowa State Highway Comm'n, 252 Iowa 1128, 109 N.W.2d 713 (1961). No encroachment was involved in this case. *See* People *ex rel.* Dep't of Public Works v. Ayon, 54 Cal. 2d 217, 228-29, 352 P.2d 519, 530 (1960), suggesting recovery is possible if the interference with access, although temporary, is substantial or unnecessary to work. Possible recovery for temporary loss of access is also indicated in Cleveland Boat Service v. City of Cleveland, 102 Ohio App. 255, 130 N.E.2d 421 (1955).

is acquired at the same time access to the road is cut off, a taking of access rights almost always has been found even though a service road was provided for the abutting land. However, the taking question has often been given to the jury, indicating a finding that no taking occurred would have been sustained. If no widening strip is acquired and the existing roadway becomes the service road for limited access lanes built parallel to it and across the existing road from the subject land, the decisions are split, those denying a taking being perhaps slightly in the preponderance. Access rights to an existing road may be wiped out without acquiring a widening strip and without providing a service road, either by placing structures within the existing right of way, vacating the road, or by acquiring the access rights as such. Usually no taking is found when structures are used, although if curb openings are allowed at all, reasonable access is required for each separate land use possible on a single tract. If the method used to remove access is to vacate the street, a taking usually is found. If access rights are eliminated by governmental action not involving barriers, sometimes a taking is found, sometimes not. Cases finding a taking often involve statutes showing a legislative intent to pay compensation. If the governmental action is explicit condemnation of access rights, the cases sampled indicate a taking always is found unless equally good access is provided in kind.

The cases considered indicate access is always taken when a widening strip is acquired for an existing road which then is made limited access and no service road is provided. Conversely, the well reasoned cases never find access taken when a limited access highway is built where no type of highway previously existed. Where an existing highway is relocated and the old road way is abandoned the cases are split.

A considerable amount of apparent inconsistency in the results of cases determining whether access rights have been taken dissolves when the cases are grouped by basic fact situations. That which remains does not arise from differences in basic doctrine among the states but rather from differences of opinion among juries as to how much restriction of access must occur before a taking results, and, occasionally, from mistakes by judges in applying the law. Determinations that access rights have or have not been taken typically flow from consideration of the changes in possible uses of property—either the access easement or the tract to which it pertains—caused by the governmental action in question. The consideration may be governed, however by an unexpressed awareness of costs to the government. If a taking is found, just compensation must be considered, a consideration that

more frankly emphasizes economic factors, including the probable effect on the public treasury of various possible degrees of compensation. Thus, where driveway openings allowed the adjoining tract are so adequate the court concludes practical use of the land is not impaired, the court may say either that access rights have not been taken but regulated, or that they have been taken but no monetary harm has been sustained.

C. Commentary

Because the taking of access rights and the compensation for their loss that is just are both determined by intermingling property law concepts with economic estimates and predictions, the results of the cases are not consistent when tested exclusively by economics. Thus, similar economic harm to the landowner occurred when a limited access highway was built through a farm[101] as when it was built between two tracts that were being used as one,[102] yet compensation was paid only in the first situation. Perhaps the results of the two cases are reconcilable in the economic framework when the potential strain on the public purse is considered, since the instances when a private individual is hurt financially by public construction projects not invading the person's land physically are more numerous than those in which invasion occurs. But the instances of equally severe economic harm to the individual unaccompanied by invasion are unlikely to be so numerous as to threaten governmental solvency. The individual landowners may be expected to see more clearly the similar private harm suffered than the practical limitation on governmental ability to pay. The limits of governmental ability to pay are fixed by a combination of such matters as community wealth, income, borrowing power, attitudes toward acceptable tax levels, and attitudes toward the institution of private property. As such facts and attitudes change, so does the ability of government to pay for highway construction. At any given level of governmental ability to pay perhaps condemnation decisions would achieve more generally recognized justice if the criteria of both taking and compensation were exclusively economic.

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101. State Highway Comm'n v. Union Planters Nat'l Bank, 231 Ark. 907, 333 S.W.2d 904, *rehearing*, 232 Ark. 200, 334 S.W.2d 879 (1960).

102. Warren v. Iowa State Highway Comm'n, 250 Iowa 473, 93 N.W.2d 60 (1958).

II. Change of Grade

A. Present Law

No common-law property right exists to have the highway grade remain the same. Typically it is said the public right in the highway is not limited to passing over the surface as it existed when the right of way was acquired, but extends to making reasonable improvements in the grade to make the road safer and more convenient to use.[103] It is presumed that damages for possible changes of grade were included in the payment made when the right of way was acquired.[104] Beyond the talk of presumption lies fear that to rule otherwise would "open the floodgates of litigation" with its attendant increase in damage awards.[105] However, when the change of grade effectively prevents or substantially hampers the exercise of particular property rights and thereby lowers the value of the tracts to which the rights pertain, compensation may be required.[106] Some of the cases requiring compensation for change of grade emphasize that the particular state constitution calls for compensation whenever property is "taken or damaged" rather than just when it is "taken."[107] Actually, the reason based on

103. Lewis v. State Road Dep't, 95 So. 2d 248 (Fla. 1957); City of Tampa v. Texas Co., 107 So. 2d 216 (Fla. App. 1958); Horn v. City of Chicago, 403 Ill. 549, 87 N.E.2d 642, *cert. den. and appeal dismissed,* 338 U.S. 940 (1949); Brewitz v. City of St. Paul, 256 Minn. 525, 99 N.W.2d 456 (1959) (dictum); Thompson v. Seaboard Airline Railroad Co., 248 N.C. 577, 104 S.E.2d 181 (1958) (dictum); Anderson v. Stuarts Draft Water Co., 197 Va. 36, 87 S.E.2d 756 (1955).

104. State *ex rel.* Morrison v. Thelberg, 86 Ariz. 263, 267, 344 P.2d 1015, 1018 (1959) (decision was replaced by 87 Ariz. 318, 350 P.2d 988 (1960) but the substituted decision does not discuss change of grade); Anderson v. Stuarts Draft Water Co., 197 Va. 36, 87 S.E.2d 756 (1955). Of course the presumption cannot exist when the right of way is first acquired when the change of grade occurs; in such situation, dictum in the first opinion asserts, compensation for access or, presumably, other property interests lost by change of grade would be paid. 86 Ariz. 263, 267, 344 P.2d 1015, 1018.

105. Anderson v. Stuarts Draft Water Co., 197 Va. 36, 87 S.E.2d 756 (1955).

106. Pima County v. Bilby, 87 Ariz. 366, 351 P.2d 647 (1960) (access); Clark County v. Mitchell, 223 Ark. 404, 266 S.W.2d 831 (1954) (access); City of East Point v. Allison, 97 Ga. App. 499, 103 S.E.2d 664 (1958) (access); Mayor of Athens v. Gamma Delta Chapter House Corp., 86 Ga. App. 63, 70 S.E.2d 621 (1952) (access); Anderlik v. Iowa State Highway Comm'n, 240 Iowa 919, 38 N.W.2d 605 (1949) (access, light and air); Brewitz v. City of St. Paul, 256 Minn. 525, 99 N.W.2d 456 (1959) (lateral support); Collins v. Village of Richfield, 238 Minn. 87, 55 N.W.2d 628 (1952) (land subjected to drainage of surface water); Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N.W.2d 727 (1960) (access).

107. Pima County v. Bilby, 87 Ariz. 366, 351 P.2d 647 (1960); Clark County v. Mitchell, 223 Ark. 404, 26 S.W.2d 831 (1954); Mayor of Athens v. Gamma Delta Chapter House Corp., 86 Ga. App. 53, 70 S.E.2d 621 (1952); Collins v. Village of Richfield, 238 Minn. 87, 55 N.W.2d 628 (1952).

the constitutional language probably is a make-weight. Although compensation has been denied in a state whose constitution only requires compensation when property is taken,[108] the court of another state easily construed such language liberally and concluded compensation was required.[109]

Some states have statutory provisions for paying damages to landowners abutting the highway who have improved their property consistently with the established street grade, only to find the established grade changed and the value of their property diminished thereby.[110] Some statutes do not require the roadside property to have been improved.[111] The basis of recovery under these statutes appears to be estoppel. There must be a change in position by the landowner in reliance on the continuance of a physical condition the municipality is deemed to have held out as permanent. The estoppel basis of the statutes is implicit in judicial interpretation that it is not sufficient, to establish a grade, that a municipality use and maintain the street at its natural level or lay sidewalks,[112] or issue building permits[113]—nor will the mere lapse of time after acqusition of the roadway establish a grade.[114] To establish a grade, some distinct official act by municipal authority done for that purpose seems to be required. The explanation for not holding the city liable for harm caused by conforming the street to the first established grade is that the landowner should have anticipated the street would be improved.[115] However, the particular form the improvement takes may not be anticipated, and in such case compensation is paid. Building an overpass in front of the subject property, shutting off light and access, has been held a mode of street improvement that could not be anticipated by the

108. City of Tampa v. Texas Co., 107 So. 2d 216 (Fla. 1958).

109. Anderlik v. Iowa State Highway Comm'n, 240 Iowa 919, 38 N.W.2d 605 (1949). This case involved a deprivation of access, light, and air as a result of the change of grade, facts which may have influenced the court in concluding a liberal construction was intended.

110. *See, e.g.,* IOWA CODE ANN. § 389.22 (1965); NEW HAMP. REV. STAT. ANN. § 245.20 (1965).

111. *See, e.g.,* NEB. REV. STAT. § 16-615 (1943); R. I. GEN. LAWS § 24-3-27, as constructed by Gardiner v. Town of Johnston, 16 R. I. 94, 12 A. 888 (1880).

112. Kenner v. City of Minot, 98 N.W.2d 901 (N.D. 1959); Schrock v. King County, 55 Wash. 2d 655, 349 P.2d 594 (1960). The *Schrock* case in dictum says such use and maintenance will establish a grade if the municipal authorities so intend.

113. Schrock v. King County, 55 Wash. 2d 655, 349 P.2d 594 (1960).

114. *Id.*

115. Kenner v. City of Minot, 98 N.W.2d 901 (N.D. 1959).

landowner.[116] Dictum indicates that improving a street to a grade other than the grade previously established also cannot be anticipated, at least where notice of the improvement given by the city implies compliance with the established grade.[117] Issuing building permits does not establish a grade by estoppel because they contain no statement regarding the grade line.[118]

A Maine statute[119] makes damages due to changing the grade of a state highway compensable without regard to reliance by the landowner. The owner may apply to the highway commission for determination of his damages within six months of completion of the work. Only owners of land adjoining the highway are covered by the statute. The statute has not yet been construed by the Maine court. However, the statute could be construed to include injuries to rights in personam as well as rights in rem since the language employed is "injury of an owner of adjoining land" and provides for determining "his" damages. If so interpreted the statute might allow compensation for loss of a scenic view even when access of light and air are undisturbed.

The Florida court has asserted land area must be taken when the change of grade occurs in order that damages caused by the latter be compensated.[120] The reason may be that the Florida constitution requires compensation only when land is taken.[121] The Minnesota court eliminated a similar requirement when the state constitution was changed from the "land taken" to the "land taken or damaged" type.[122] The requirement that land area be taken when the road grade is changed, in order that damages caused by the grade change be compensated, is also consistent with defining the public right in a highway to include the right to improve the grade. The form of expression used in the just compensation clause of the Florida constitution is an unsatisfactory reason for the Florida requirement, since some other states with the "land taken" type of clause have sometimes compensated change

116. Cummings v. City of Minot, 67 N.D. 214, 271 N.W. 421 (1937).

117. Gianni v. City of San Diego, 194 Cal. App. 2d 56, 14 Cal. Rptr. 783 (1961).

118. Schrock v. King County, 55 Wash. 2d 655, 349 P.2d 594 (1960).

119. ME. REV. STAT. ANN. tit. 23, § 652 (1965).

120. Lewis v. State Road Dep't, 95 So. 2d 248 (Fla. 1957) (dictum); Jacksonville Expressway Authority v. Milford, 115 So. 2d 778 (Fla. App. 1959); City of Tampa v. Texas Co., 107 So. 2d 216 (Fla. App. 1958) (dictum indicating that not only must land area be taken, but also the remnant parcel must be damaged by the taking, for compensation to be paid for change of grade).

121. FLA. CONST. art. XVI, § 29.

122. Collins v. Village of Richfield, 238 Minn. 87, 55 N.W.2d 628 (1952).

of grade damages without land area having been taken.[123] The Florida requirement is not typical. An examination of the sample cases in which change of grade damages were compensated shows half of them involved no taking of land area[124] and half of them did.[125] However, taking land area virtually assures compensation for damages caused by an accompanying grade change. The only such instances where grade change damages were not compensated involved situations where the land taken had nothing to do with possible harm caused by the change of grade.[126]

B. Commentary

Refusal of the courts to consider a change of grade as, in and of itself, a harm to adjoining landowners requiring compensation may reflect a judicial policy to allow the government to improve its own property, the road system, as it pleases so long as undue harm does not befall owners of roadside property as a result. Such a policy may be placing the government on a footing similar to that of private landowners—amenable to the law of nuisance—depending on whether the determination of "undue harm" is the same when the harm is caused by the government as when it is caused by a private landowner. Even assuming the determination is the same, the liability of the government extends only to the owner immediately adjacent, whereas the liability of the private landowner may extend to owners geographically more remote. Refusal to treat change of grade as itself requiring compensation seems realistic in view of the impact on the owner of roadside land. Physical changes within the existing right of way affect

119. ME. REV. STAT. ANN. tit. 23, § 652 (1965).

124. Pima County v. Bilby, 87 Ariz. 366, 351 P.2d 647 (1960); City of East Point v. Allison, 97 Ga. App. 499, 103 S.E.2d 664 (1958); Anderlik v. Iowa State Highway Comm'n, 240 Iowa 919, 38 N.W.2d 605 (1949); Collins v. Village of Richfield, 238 Minn. 87, 55 N.W.2d 628 (1952).

125. Clark County v. Mitchell, 223 Ark. 404, 266 S.W.2d 831 (1954); Mayor of Athens v. Gamma Delta Chapter House Corp., 86 Ga. App. 53, 70 S.E.2d 621 (1952); Brewitz v. City of St. Paul, 256 Minn. 525, 99 N.W.2d 456 (1959); Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N.W.2d 727 (1960).

126. Jacksonville Expressway Authority v. Milford, 115 So. 2d 778 (Fla. App. 1959) (strip of land adjacent to existing street taken; grade of taken land unchanged and a one-way street built thereon; grade of pre-existing street raised, grade being entirely within the existing right of way); City of Tampa v. Texas Co., 107 So. 2d 216 (Fla. App. 1958) (190 square feet taken from corner of lot improved with a gasoline service station; grade of existing street lowered, entirely within existing right of way; grade change forced repaving and rearranging facilities of the service station; and the land taken did not involve any approach to the station).

the owner only if they infringe significantly on his ability to use his land. Without such an infringement there has been no harm to the landowner, hence no occasion for compensation. The statutes enacted in this field are consistent with the cases in requiring proof of harm to the roadside owner caused by government action.

III. Loss of Business or Temporary Impairment of Access During Construction

A. Present Law

Court decisions are split regarding compensability of damages which are the subject of this section, with the preponderance in the sample studied denying compensation.[127] Different reasons for denying payment have been given. Where there has been no physical invasion of the adjoining property and a pre-existing street or highway is involved, it has been said the easement previously acquired for the street included the right to make such changes in the highway as the changing needs of traffic made necessary.[128] Judicial language indicates payment would be made for business losses or temporary loss of access caused by state acts not necessary to its duty to repair or modernize the road, or arising from an original taking of land.[129] Sometimes it is said that business losses are not property but personal to the owner and therefore are not compensable.[130] Again, where the "no property" reason is used the judges indicate compensation would be required if the loss

127. Denying compensation: Anselmo v. Cox, 135 Conn. 78, 60 A.2d 767, *cert. den.*, 335 U.S. 859 (1958) (business loss and temporary access loss); Dep't of Public Works and Bldgs. v. Maddox, 21 Ill. 2d 489, 173 N.E.2d 448 (1961) (business loss); Wilson v. Iowa State Highway Comm'n, 249 Iowa 994, 90 N.W.2d 161 (1958) (business loss); Blank v. Iowa State Highway Comm'n, 252 Iowa 1128, 109 N.W.2d 713 (1961) (business loss and temporary access loss); Opinion of the Justices, 157 Me. 104, 170 A.2d 647 (1961) (business loss); Ryan v. Davis, 201 Va. 79, 109 S.E.2d 409 (1959) (business loss and temporary access loss).

Allowing compensation: Heimann v. City of Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947) (temporary loss of access); Parrotta v. Commonwealth, 339 Mass. 402, 159 N.E.2d 342 (1959) (temporary loss of access); Carazalla v. State, 269 Wis. 593, 70 N.W.2d 208 (1955) (temporary access loss); Richards v. State, 14 Wis. 2d 597, 111 N.W.2d 505 (1961) (temporary access loss).

128. Anselmo v. Cox, 135 Conn. 78, 60 A.2d 767, *cert. den.*, 335 U.S. 859 (1958).

129. *Id.*

130. Dep't of Public Works and Bldgs., v. Maddox, 21 Ill. 2d 489, 173 N.E.2d 448 (1961) (citing at 493-94, Chicago Flour Co. v. City of Chicago, 243 Ill. 268, 90 N.E. 674 (1910)); Blank v. Iowa State Highway Comm'n, 252 Iowa 1128, 109 N.W.2d 713 (1961); Ryan v. Davis, 201 Va. 79, 109 S.E.2d 409 (1959).

occurred by virtue of unnecessary state conduct, such as unreasonable delay in performing the work.[131] Still other times no clear reason is given for denying compensation.[132]

The distinction between necessary and unnecessary conduct by the state appears also in some of the decisions allowing compensation. Thus in *Heimann* v. *City of Los Angeles*[133] it was said an unnecessary and substantial temporary impairment of property rights should be compensated, as should an actual, temporary invasion of the right of possession. The court held admissible as tending to prove such impairment evidence of an unreasonable, 16-month delay in constructing a viaduct; loss of use of the claimant's land during construction due to piling earth, rock, and other materials in the street and on the property; the erection of sawmills, sheds and other structures; the accumulation of waste and rubbish on and near the claiment's premises; and the partial obstruction and closing of streets. In trying to indicate what it considered noncompensable, the court said:

> It would unduly hinder and delay or even prevent the construction of public improvements to hold compensable every item of inconvenience or interference attendant upon the ownership of private real property because of the machinery, materials, and supplies necessary for the public work which have been placed on streets adjacent to the improvement. But it does not follow that an unnecessary and substantial temporary invasion of the right of possession of private property during construction should take place without redress.
>
> Generally it has been said: 'The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; . . .'. [citing California cases][134]

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131. Blank v. Iowa State Highway Comm'n, 252 Iowa 1128, 109 N.W.2d 713 (1961).

132. Wilson v. Iowa State Highway Comm'n, 249 Iowa 994, 90 N.W.2d 161 (1958); Opinion of the Justices, 157 Me. 104, 170 A.2d 647 (1961). The latter case cites 4 P. NICHOLS, EMINENT DOMAIN (1950 3d ed.) § 13.3 at 254. Since 1961 § 13.3 has been revised and now deals with business losses and states that they have usually been denied compensation because business prosperity is too unstable to come within the constitutional protection.

133. 30 Cal. 2d 746, 185 P.2d 597 (1947).

134. *Id.* at 755-56, 185 P.2d at 603.

The only example offered by the court was a decision[135] granting compensation for an entry on private land made before condemnation in order to take certain measurements and make certain tests. Additional examples are provided in a later case[136] in which a landowner offered to prove that the street adjoining this land would not be torn up, as the state's construction plan predicted, for only 90 days with one lane of traffic open at all times to which the land would have direct access, but rather would be torn up for six to twelve months and that the contractor probably would so narrow the entrances to the land that access to the street would practically be impossible. The trial court refused the offer of proof. In upholding the trial court the Supreme Court of California said no compensation for temporary interference with access rights would be paid "provided such interference is not unreasonable, that is, occasioned by actual construction work. It is often necessary to break up pavement, narrow streets and provide inconvenient modes of ingress and egress to abutting property during the time streets are being repaired or improved. Such reasonable and temporary interference with the property owner's right of access is noncompensable."[137] If the project is actually not constructed as originally planned, the court in dictum asserts compensation would be paid for unnecessary, substantial damage caused by the change in plans, but only in an action brought after the damages actually are sustained. Until then the damages are too speculative for compensation.[138] If the court follows its dictum, the result is in California temporary interference, no matter how severe, is not compensable if caused by actual construction work, unless it results from a deviation from the construction plans existing at the time of the condemnation. The opinion does not attempt to define actual construction work. The opinion also is silent regarding invasion of a landowner's right of possession; presumably such invasion remains compensable even though it was caused by actual construction.

The Wisconsin court has found that damages sustained during construction are noncompensable as a separate item but that they are to be considered in determining the after value of the property.[139] No

135. Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986 (1923).

136. People *ex rel.* Dep't of Public Works v. Ayon, 54 Cal. 2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960).

137. *Id.* at 228, 352 P.2d at 525, 5 Cal. Rptr. at 157.

138. *Id.* at 228-29, 352 P.2d at 525-26, 5 Cal. Rptr. at 157-58.

139. Richards v. State, 14 Wis. 2d 597, 111 N.W.2d 505 (1961); Carazalla v. State, 269 Wis. 593, 70 N.W.2d 208 (1955).

reason is given for denying recovery for such damages as a separate item. The reason for considering them in fixing the after value is that a prospective buyer immediately after the taking would take them into account in deciding what price to offer for the land.[140] The result is that not even such indirect compensation for temporary loss of access or loss of business profits during construction is available in Wisconsin unless a partial taking of property occurs since without a partial take no occasion or possibility for determining an after value arises.

Finally, in Massachusetts compensation is paid[141] for interference with use of land and access thereto caused by tearing up abutting streets during reconstruction, by virtue of a statute allowing payment "when the injury has been caused to the real estate of any person by the laying out or alteration of a state highway."[142] If no partial taking occurred the recovery is limited by another statute[143] to damages "special and peculiar" to the land involved. Also, an Indiana statute[144] may be broad enough to include loss of business or temporary impairment of access.

B. Commentary

Many courts appear to believe a person owning land by which a highway is to be built realizes that in future years the highway must be maintained and possibly redesigned, and that the damage such work will do to the land is paid for in the price the state pays for the highway easement. At the same time, the courts recognize that compensation for such harm will be achieved through the real estate market only to the extent that the harm is foreseeable by prospective land buyers, hence the development of the unnecessary state conduct concept. Both ideas ostensibly make compensation depend on judicial notions of land buyers' psychology. One may doubt whether the judges' assumptions are sound. For instance, although landowners probably do realize a highway is going to need repairs they may very well also expect the government will pay for whatever harm the repair work causes adjacent land. And who is to say what a landowner who is not a highway engineer will think is necessary state conduct in repairing highways?

140. 269 Wis. 593, 607, 70 N.W.2d 208, 215-16.
141. Parrotta v. Commonwealth, 339 Mass. 402, 159 N.E.2d 342 (1959).
142. MASS GEN. LAWS ANN. ch. 81, § 7 (1964).
143. *Id.* ch. 79, § 12.
144. IND. ANN. STAT. § 3-1706(4) (1946). *See* note 151, *infra,* and accompanying text.

A more realistic approach might be to allow the landowner to recover whatever temporary damages he proved he sustained, the recovery to be obtained in a suit brought after the construction was completed. The landowner should be allowed to recover regardless of whether a partial taking otherwise occurred, since the harm under discussion may occur in either event. The recovery might come from the enhancement in the land's value caused by the highway project, to the extent the state proves such enhancement occurred.

IV. Loss of Past Expenditures

Claim was made in only one case of the sample for money spent prior to the taking for items related to improvements planned for the land taken and which items were rendered useless by the taking. *City of Chicago v. Provus*[145] arose from a partial taking of certain land. As part of the severance damages, the landowner sought to introduce evidence that he had planned to build an apartment building on his land as it existed prior to the taking and that the size and shape of the parcel remaining to him after the taking was not suitable for the building he had planned. Specific expenses he had incurred prior to the taking in connection with the planned apartment building for which he claimed compensation as part of the severance damages were an appraisal fee and other service charges he had paid to obtain an FHA insured mortgage loan for the building and the cost of architect's plans he had obtained for the building. All of the items for which he had incurred the expenses were rendered useless to the landowner by the taking since the apartment building could not be built on land remaining to him. The Illinois court denied compensation for all of the claimed items, declaring the measure of compensation to be the fair cash market value of the land for the highest and best use to which it is available plus any decrease in the fair cash market value of the portion of the land not taken. The court asserted the capital outlay for planning future uses of the land and financing improvements to vacant land could not be said to increase the market value of the land, but rather created value peculiar to the owner because of the planned improvement. Since the outlay did not affect market value, it was excluded from the stated measure of compensation.[146] The court distinguished two earlier Illinois cases[147] where the costs of rehabilitat-

145. 415 Ill. 618, 114 N.E.2d 793 (1953).
146. *Id.* at 621, 114 N.E.2d at 795.
147. City of Chicago v. Callender, 396 Ill. 371, 71 N.E.2d 643 (1947); City of Chicago v. Koff, 341 Ill. 520, 173 N.E. 666 (1930).

ing existing structures partially destroyed by a taking were compensated. The distinction was that in the earlier cases the damages "made a part of the market value."[148]

The distinction is not persuasive, assuming the highest and best use of the land was for an apartment house. Completion of preliminary steps to obtain financing for such a building would make the land more valuable to a prospective buyer also interested in improving the tract to its highest and best use. Such a person also would be interested in the building plans, either to use them for his own building or at least to be considered with other plans he might have drawn. Therefore the expenditures here involved contributed to the land's market value as much as did the injury to existing buildings found in previous cases to have contributed to their value. The expenditures created values in the land, not simply peculiar to the owner but in some degree significant for any prospective buyer interested in building an apartment house on the land.

Apart from whether expenditures of the type involved in the *Provus* case created a special market value in the land, it seems wise to include them in compensation, at least where there is no suspicion the owner knew of the impending condemnation. Clearly the expenses were necessary to further develop the land and, had the development to which they pertain been completed prior to condemnation, there could be no question the value of the development would have figured in the compensation awarded. Surely the same would be true if the contemplated structure was still in the process of being erected when the land was taken. No distinction suggests itself between building activities involving physical materials and those involving financing arrangements and architects' plans, except that sometimes the plans would be usable on another tract. They all are necessary and specifically addressed to erection of a particular building. One may suspect that some juries will include past expenditures that excite their sympathy in the figure they find to be the market value of the land. Certainly in view of the wide divergences of appraisers' testimony it would be easy to do. Making past expenditures related to the land taken an explicit element of compensation to the extent proved would remove incentive for uncontrolled jury generosity.

Wisconsin by statute[149] makes compensable plans and specifications specifically designed for the property taken and which are of no value

148. 415 Ill. at 622, 114 N.E.2d at 795.

149. WIS. STAT. § 32.19(5) (1965).

elsewhere because of the taking. The expense cannot be collected in the condemnation proceeding but the landowner may bring a later proceeding within two years following the date the condemnor takes possession of the property and recover to the extent he proves the expense exists.[150] An Indiana statute requires appraisers to determine and report severance damages and "such other damages, if any, as will result to any persons or corporation from the construction of the improvements in the manner proposed . . ."[151] Conceivably, past expenditures related to developing the land taken are covered by the statute, although the Indiana court has concluded good will and future business profits are not.[152]

V. Expenses After Condemnation

A. Present Law

This section deals with the expense of various types of work necessitated by a partial taking to make the remainder land usable. The courts usually have denied compensation for this type of expense, judging from the results of the cases sampled.

Just as various expenses have been claimed, so various reasons for denying them have been advanced—some contradictory. In Iowa the court apparently has doubted that the precise future work on which the claim is based will actually be performed, hence has denied the claim as speculative where an improvement new to the property is involved.[153] The Iowa court in dictum has said the cost of moving an

150. *Id.* § 32.20.

151. Ind. Ann. Stat. § 3-1706 (1946).

152. *See* Elson v. City of Indianapolis, 246 Ind. 337, 204 N.E.2d 857 (1965).

153. Trachta v. Iowa State Highway Comm'n, 249 Iowa 374, 86 N.W.2d 849 (1957). The case involved a 160-acre farm consisting of four 40-acre tracts. Three of the tracts fronted a county road; two of the three adjoining one another, the third being separated from them by a neighbor's 40-acre tract. The fourth 40-acre tract lay behind the neighbors tract, had no road frontage, and only touched the farm of which it was a part at both ends of its boundary with the neighbor's tract. A widening strip was taken along the entire road frontage of the farm and the road became the new route of a heavily travelled federal highway. The farmer alleged as a result he would no longer be able to move his cattle to and from the isolated 40 by driving them along the road but would have to truck them. To do this, a corral with a loading chute would have to be built in the isolated 40. Also, he alleged the new highway so increased water drainage on to the contiguous 80 that new tile was needed under that part of the farm. Evidence of the cost of the new corral and chute was properly excluded as speculative, the Iowa Supreme Court said, although the detriments the land suffered by the taking might be shown.

already existing structure such as a fence, where exactly the same materials are to be used and there is no uncertainty regarding future maintenance, is compensable.[154] Another reason advanced in the Iowa cases for denying compensation for expenses of new structures is that it might confuse the jury. The measure of damages is the depreciation in the value of the land caused by the taking and the improvement. The purpose of admitting evidence of the cost to remedy defects in the remaining land caused by the taking is to show depreciation in value. However, the court fears such evidence would lead the jury to add it to the depreciation in value and thereby produce a double recovery.[155] New Hampshire also denies compensation for post-condemnation expenses as a separate item of damages but, contrary to Iowa, allows the expenses to be introduced in evidence, the jury to consider them only to the extent prospective purchasers would in determining their offer for the remaining land.[156]

Limiting compensation to the depreciation in land value caused by the taking suggests the familiar limitation of compensation to condemned property rights. The Georgia court has denied compensation for expenses incurred following condemnation because they are not evidence of the value of the property taken.[157] Compensation also has been denied on grounds of fairness where the expense claimed was for increased public liability insurance allegedly necessitated by widening the highway adjoining land on which the claimant stored natural gas. The court said the landowner might reap the benefits from increases in population and traffic encouraged by highway projects but could not require the public to pay for increased insurance the landowner might require or deem desirable in reaping such benefits.[158] Similarly,

154. *Id.* at 379, 86 N.W.2d at 853.

155. Harmsen v. Iowa State Highway Comm'n, 251 Iowa 1351, 105 N.W.2d 660 (1960); Trachta v. Iowa State Highway Comm'n, 249 Iowa 374, 86 N.W.2d 849 (1957).

156. Edgcomb Steel v. State, 100 N.H. 480, 131 A.2d 70 (1957) (Cost of rearranging facilities on remaining land. The court placed some reliance on an applicable statute's failure to require compensation for damaging land).

157. Minsk v. Fulton County, 83 Ga. App. 520, 64 S.E.2d 336 (1951) (Building taken in which claimant leased space for a pool room; evidence of cost of new building claimant had to erect to continue business, and of cost of storing pool room equipment while erecting the new building was properly excluded because unrelated to the new value of the unexpired portion of the lease).

158. Natural Gas and Appliance Co. v. Marion County, 58 So. 2d 701 (Fla. 1952). The court also appeared unconvinced the need for the increased insurance arose from the highway project, remarking that the cost of doing business might vary from changes in economic conditions as well as from changes in the street *Id.* at 703.

special assessments that probably would be levied for paving and water mains in a new street could not be recovered by the owner of land from which part had been taken for the street.[159] Since the assessment represented a benefit conferred on the land by the government in opening the street, to allow the owner to recover the assessment in addition to the damages his land suffered by the taking would force the government to pay the owner to confer a benefit on his land. Such payment would be unfair not only to the government but to the other landowners subject to the special assessment but none of whose land was taken.[160] Secondary reasons advanced for denying recovery of special assessments, somewhat inconsistent with the primary one, were that damages are to be determined as of the date of taking, and uncertainty of the precise street improvement that would be made.[161] Where the theory of the claim is that the state committed a civil wrong toward the claimant, compensation has been denied on the ground of sovereign immunity from suit.[162]

Occasionally a court has indicated circumstances in which post-condemnation expenses would be recoverable as a separate item, not merely to the extent they evidence decline in market value of the remainder. North Dakota, taking a view opposite from Iowa's, required evidence of the cost of a specific, new improvement. The North Dakota court denied a claim for the cost of building a concrete surfaced ford in a landowner's driveway made muddy by ditch water overflow caused by a highway project, but declared the claim would have been allowed had there been evidence to support the estimated cost of the ford.[163] The declaration was aided by a statute requiring the state to pay damages for property not taken but injuriously affected by a pub-

159. City of Lincoln v. Marshall, 161 Neb. 680, 74 N.W.2d 470 (1956).

160. *Id.* at 683-85, 74 N.W.2d at 472-73.

161. *Id.* at 683, 74 N.W.2d at 472.

162. Rhodes v. Iowa State Highway Comm'n, 250 Iowa 416, 94 N.W.2d 97 (1959). The owner had sold a widening strip to the highway commission, the contract of sale requiring the owner to move certain buildings off the strip by a certain date on penalty of title passing to the state. The owner alleged he had moved the buildings to a place designated by the commission, but due to the commisson's error the building as moved overhung the highway. The owner sought an injunction restraining the commission from taking title without paying the cost of further removal of the buildings. In dismissing the suit, the court said suit would have been possible had fraud, illegality or lack of authority for the commission's acts been alleged, but not when merely a mistake by the commission was alleged.

163. Little v. Burleigh County, 82 N.W.2d 603 (N.D. 1957).

lic project.[164] The court indicated an element of damage it construed to be outside the statute—increased business expense caused by inability to truck milk across the muddy place—would not be compensable as a separate item of damages, although evidence of the inability was admissible because material to the market value of the remnant.[165] Minnesota has held the costs of removing part of a building to comply with a highway set-back ordinance compensable which condemnation had made applicable to the building.[166] The state supreme court approved the trial court's jury instruction that the need to destroy part of the building to comply with the ordinance was a proximate result of the taking.[167] Thus, the destruction appears to have been considered part of the severance damages and its cost compensable for that reason. If an intervening cause not traceable to the taking really forced the destruction, then destruction costs would not be compensated. If a reasonable chance existed to obtain a variance from the ordinance to allow the building to stand, application for such variance would have had to have been made and denied before the destruction costs could be compensated in condemnation.[168]

Wisconsin, by statute, provides for compensating certain expenses after condemnation. These include the cost of fencing reasonably necessary to separate the land taken from the rest of the condemnee's land, less the amount allowed for fencing condemned,[169] cost of realigning personal property on the same site in partial takings or where required by elimination or restriction of existing used access rights,[170] and certain refinancing costs in purchasing a property similar to the property taken.[171] The last two items are not paid in the

164. N.D. CENT. CODE § 32-15-22 (1943). Subsection (2) requires payment of damages that accrue to the remnant by reason of "the construction of the improvement in the manner proposed."

165. 82 N.W.2d at 614.

166. State v. Pahl, 254 Minn. 349, 95 N.W.2d 85 (1959).

167. *Id.* at 353-54, 95 N.W.2d at 88-89.

168. *Id.* at 357-58, 95 N.W.2d at 91.

169. WIS. STAT. § 32.09(6)(g) (1965). The section denies such allowance where the government fences the right of way without cost to abutting lands.

170. *Id.* § 32.19(1).

171. *Id.* § 32.19(3). The section requires for a recovery that the land when taken must be subject to a bona fide mortgage or held under a vendee's interest in a bona fide land contract, either instrument to have been executed in good faith prior to the date of the relocation order in condemnation under § 32.05 or determination of necessity of taking in condemnation under § 32.06. The refinancing costs allowed are reasonable fees, commissions, discounts, surveying costs and title evidence costs necessary to refinance the balance of the debt at the time of taking, all if actually incurred, and increased interest cost, if any above that provided in the former financing.

condemnation proceedings, but only after they fully materialize and the owner files a claim for them with the highway commission.[172] The Indiana statute[173] previously discussed,[174] requiring payment of damages that will result from construction of improvements in the manner proposed might be construed to require compensation of expenses after condemnation.[175]

B. Commentary

Major obstacles to compensating expenses after condemnation are to be certain the projected actions will really be taken, and that they will be no more elaborate than necessary to meet the evil effects of the project. Doubts of the first type can be removed statutorily by requiring claims for the improvement's costs be made only after the costs are incurred. Doubts that the particular improvement made was necessitated by the highway project may be met by limiting recovery to the reasonable costs of an improvement likely to remedy the detrimental situation caused by the project. With those limitations, it seems wise to pay expenses after condemnation as a type of severance damage where a partial taking is involved, or as an expense so intimately connected with the ownership of land as to be a part of the land's value where a complete taking occurs. For example, the refinancing costs allowed by statute in Wisconsin might be considered part of the benefit of land ownership since by owning the land the expenses are avoided and it is only because the land was taken that the expenses were incurred. Since this benefit of land ownership will not affect a prospective buyer's offer for the land, it would seem best to provide by statute for its compensation as a separate item of recovery distinct from compensation for property taken.

A problem arises in determining the point at which compensable expenses after condemnation end. Minnesota paid the costs of destroying a building. Suppose the owner elected to continue in business

172. *Id.* § 32.20.

173. IND. ANN. STAT., § 3-1706 (1946).

174. *See* note 151, *supra,* and accompanying text.

175. Such a construction has been given the similar North Dakota statute (N.D. CENT. CODE § 932-15-22 (1943)) in Little v. Burleigh County, 82 N.W.2d 603 (N.D. 1957). The Indiana statute is broader than the North Dakota statute in that it requires compensation for damages that the improvement will cause any "persons or corporations," whereas the North Dakota statute only requires compensation for damages to land. Thus, the Indiana statute could easily be construed to include the increased business expense caused by inability to truck milk across a muddy spot in the owner's driveway which the North Dakota court in *Little v. Burleigh County* construed to be outside the North Dakota statute. *See* note 30 *supra.*

and erected a new building substantially similar to the one that had been destroyed. Would the erection costs also be compensable? And the cost of land that might have had to be purchased for a suitable site? One may suggest these costs should be compensated since they were forced upon the owner by the taking. Or one can suggest they should not be compensated since the decision to stay in business and thus incur the costs was a different decision, and made by a private person, from the decision, made by a public body, to take the land. The first suggestion seems more realistic, assuming most businessmen are not wanting to retire when their business property happens to be taken. A limitation on compensation for a new building and site would be the difference between the costs incurred for the new place of business and the compensation previously received for the land taken. Otherwise the owner would be better off after the taking than before, instead of simply having been made whole. Where residential property is taken, the cost of comparable housing should also be compensated to the extent it exceeds compensation for the original property taken.

Where new facilities must be acquired to replace the old ones taken, as in the examples of commercial and residential buildings just discussed, the owner remains better off than before the taking, even when compensation is reduced by the compensation for the property taken. He has a new facility rather than an old one, with all the attendant technological benefits and reduced maintenance costs. If the public pays all the excess costs the owner enjoys a windfall on the benefits of "newness." If the public pays none of the excess costs, many owners will suffer from "newness" thrust upon them they cannot afford. Perhaps further limiting public payment to one-half of the costs exceeding compensation for the property taken would be fair under the circumstances.

VI. Light, Air and View

A. Present Law

According to the sample cases, loss of light, air, and view is more frequently held to be compensable[176] than not.[177] It appears to make

176. People *ex rel.* Dep't of Public Works v. Stevenson & Co., 190 Cal. App. 2d 103, 11 Cal. Rptr. 675 (1961); People v. Loop, 127 Cal. App. 2d 786, 274 P.2d 885 (1954); Gates v. City of Bloomfield, 243 Iowa 671, 53 N.W.2d 279 (1952); Anderlik v. Iowa State Highway Comm'n, 240 Iowa 919, 38 N.W.2d 605 (1949).

177. Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956); Horn v. City of Chicago, 403 Ill. 549, 87 N.E.2d 642, *cert. denied,* 338 U.S. 940 (1949).

no difference whether all three types of damage are presented in a case or only one or two.[178] Compensation has been given both for loss of view of the premises from the street,[179] and for loss of view from the premises to the surrounding countryside.[180] When compensation is paid, the reason is that light, air, and view are property rights for the taking of which the state constitution requires compensation.[181] The reason advanced for not paying compensation is that although the rights are property, they are subordinate to the public right to enjoy and improve the public way,[182] at least as long as there has been no physical invasion of claimant's property.[183] It is possible that physical invasion removes the superiority of the public right so that loss of light, air and view would be compensated as a distinct element of severance damages. In the case where no physical invasion was present, the court used that fact to distinguish an earlier case granting compensation for waterpower lost because the road department filled a swamp and thereby caused water to back up in the millrace.[184]

Some courts recognizing that loss of light, air, and view must be compensated have also acted to protect the public treasury from fiscal demands the state could ill afford. Thus, determining the extent to which the right of view has been impaired has been left to the trial court rather than the jury,[185] and recovery for lost light, air, and view has been limited to situations where the loss occurs from operations or structures placed on the land acquired from the claimant.[186]

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178. *Anderlik* involved loss of light, air and view; *Loop* and *Stevenson & Co.* involved loss of view; *Gates* involved loss of air.

179. People *ex rel* Dep't of Public Works v. Stevenson & Co., 190 Cal. App. 2d 103, 11 Cal. Rptr. 675 (1961); People v. Loop, 127 Cal. App. 2d 786, 274 P.2d 885 (1954).

180. Anderlik v. Iowa State Highway Comm'n, 240 Iowa 919, 38 N.W.2d 605 (1949).

181. People v. Loop, 127 Cal. App. 2d 786, 274 P.2d 885 (1954); Gates v. City of Bloomfield, 243 Iowa 671, 53 N.W.2d 279 (1952). Anderlik v. Iowa State Highway Comm'n, 240 Iowa 919, 38 N.W.2d 605 (1949).

182. Cases cited note 177 *supra.*

183. Weir v. Palm Beach County, 85 So. 2d 865 (Fla. 1956).

184. *Id.* at 867.

185. People *ex rel.* Dep't of Public Works v. Stevenson & Co., 196 Cal. App. 2d 103, 11 Cal. Rptr. 675 (1961). This case upholds the trial court's limiting the impairment of view that the jury could consider to that formerly obtainable from the portion of the street adjoining the property, but does not decide whether the limitation applies in all situations.

186. People *ex rel.* Dep't of Public Works v. Symons, 54 Cal. 2d 855, 257 P.2d 451, 9 Cal. Rptr. 363 (1960).

Some statutes requiring compensation appear broad enough to include loss of light, air, and view,[187] or loss of some one of the three,[188] or loss of any of the rights from a particular cause.[189]

B. Commentary

The comments made above regarding incidental effects of highway improvements appear less applicable to loss of light, air or view, assuming the loss of light, air and view is more predictable when a project is planned than is loss from flooding. If the loss can be accurately anticipated, it is more feasible to require government to acquire an easement authorizing deprivation of light, air and view, or appropriate combination, to neighboring landowners. Such an approach would assure compensation to neighbors who have experienced no partial taking of land area and thus give equal treatment to owners who have experienced the same harm. Valuation of the easement would seem difficult; perhaps payment should be made only as part of a general payment of all consequential damages proved by the claimant within a stated period after project completion, the proof to show that the value of his property is lower than it otherwise would be, and that the loss was caused by the project.

VII. Lateral Support

A. Present Law

In the handful of cases decided in recent years, the government is treated as though it were a private land developer when compensation is sought for lateral support lost as a result of highway construc-

187. *See, e.g.,* Ind. Ann. Stat. § 3-1708(4) (1946): "Such other damages, if any, as will result to any persons or corporations from the construction of the improvements in the manner proposed by the plaintiff."

188. *See, e.g.,* Wis. Stat. § 32.09(6)(c) (1965): "Loss of air rights." The language has not been construed; conceivably it refers only to rights of the owner of the land surface to occupy the space above and to be free of undue noise, etc., caused by others' use of the overlying space.

189. *See, e.g.,* Iowa Code Ann. § 387.3 (Supp. 1964) (construction of street overhead crossing or underpass within a city or town); Me. Rev. Stat. Ann. tit. 23, § 652 (1965) (change of grade of any state or state aid highway. This statute does not explicitly compensate loss of light, air and view—only "damages" experienced by injured owner of lands adjoining the changed grade); Mass. Gen. Laws Ann. ch. 81, §§ 7, 7a, 29a (1964). (These sections provide for recovery for "injury" caused the real estate of any person by laying out or altering a state highway (§ 7), or ways connecting thereto (§ 7a), or ways within a city or town, not state highways and for which federal aid is secured (§ 29a); N. H. Rev. Stat. Ann. § 245.20-.23 (1964) (damages from changing grade).

tion.[190] Thus, where no physical encroachment occurred, if the land that suffered the loss of support has no structures on it, compensation is paid[191] and without regard for negligence;[192] but if the land is improved with structures, compensation is denied[193] unless the work causing the loss of support was negligently performed.[194] The reason for the rule when applied between private developers of land is to give each an equal right to develop regardless of which does so first.[195] And where physical encroachment did occur—that is, a partial taking—compensation also is denied as a separate item of damages if the remnant suffering the loss of support is improved, compensation being deemed to have been made as part of the consequential damages awarded for harm caused by "proper preparation of the right of way as a highway."[196] And no duty to supply lateral support in kind exists where a partial taking occurred.[197]

In one situation part of a larger tract was acquired to allow a road to be widened and raised 14.5 feet.[198] After completion, and following each rain, part of the sides of the embankment supporting the raised road slid onto the apparently unimproved land of which the parcel taken had been a part. Mandamus was allowed to require condemnation of the right of lateral support.[199] The court also remarked that damages caused by negligent construction of the improvement are not included in the original condemnation award because it is then assumed the work will be done properly; therefore it is possible to compensate them in a later action.[200] Since the harm experienced was

190. Weir v. Palm Beach County, 85 So. 2d 865, 868 (Fla. 1956); Brewitz v. City of St. Paul, 256 Minn. 525, 529, 99 N.W.2d 456, 459 (1959).

191. 85 So. 2d 865, (Fla. 1956) (dictum); 256 Minn. 525, 531, 99 N.W.2d 456, 460-61 (1959).

192. Brewitz v. City of St. Paul, 256 Minn. 525, 533, 99 N.W.2d 456, 462 (1959).

193. Cases cited note 190 *supra.*

194. Weir v. Palm Beach County, at 867 (dictum).

195. *Id.* at 867-68. In Brewitz v. City of St. Paul, 256 Minn. 525, 99 N.W.2d 456 (1959), the reason given is that "in a state of nature all land is held together and supported by adjacent lands through operation of forces of nature." *Id.* at 531, 99 N.W.2d at 461. This seems no reason for imposing legal consequences on disturbances of a geologic situation.

196. Woodside v. State Highway Dep't, 216 Ga. 254, 259, 115 S.E.2d 560, 564 (1960).

197. *Id.*

198. Mapes v. Madison County, 252 Iowa 395, 107 N.W.2d 62 (1961).

199. *Id.* at 401, 107 N.W.2d at 65-66.

200. *Id.* at 400-01, 107 N.W.2d at 65.

receiving loose soil from the highway improvement and there was no subsidence of the privately owned land involved, the case seems really to compensate harm caused by negligence rather than harm caused by loss of lateral support.[201]

Where excavation across the street from certain land on which houses were located caused the street to subside, but not the houses, compensation was paid for loss of access since the street was closed as a result of the subsidence.[202] The reason was that access rights are property of the abutting owner that cannot be taken without compensation;[203] the government owned a duty of lateral support to the owner's "physical premises" and a duty to refrain from interfering with his access rights unless it paid just compensation. The private owner of the land where the excavation occurred owed a duty of lateral support to the owner's property rights in the street as well as to the lots themselves.[204]

Legislation in Indiana requiring compensation appears broad enough to include injuries from loss of lateral support.[205] Compensation statutes in Massachusetts include such injuries if caused by laying out or altering certain types of highways.[206] Statutes compensating damages caused by changing the grade of a street or highway[207] probably would apply where the loss of lateral support occurs as a result of a grade change coming within the statute.

B. Commentary

The reason for the rule confining the right of lateral support to unimproved land is not persuasive when applied to measure the government's liability for lost support. Government traditionally encourages private economic development; to deny compensation for lateral support removed by public improvements from adjoining land because it is improved tends to deter improvements and hence is contradictory of the basic policy. Some money is saved the government

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201. State Road Dep't v. Darby, 109 So. 2d 591 (Fla. App. 1959) involves similar facts. The court implied a taking on the theory that the damage was a necessary incident of the work even though the tone of the opinion suggests that negligent performance of the construction project caused the loss.

202. Hathaway v. Sioux City, 244 Iowa 508, 57 N.W.2d 228 (1953).

203. *Id.* at 513, 57 N.W.2d at 231.

204. *Id.* at 514, 57 N.W.2d at 231-32.

205. IND. ANN. STAT. § 3-1706(4) (1946); *see* note 187 *supra.*

206. MASS. LAWS ANN. ch. .81 §§ 7, 7a, 29a (1964); *see* note 189 *supra.*

207. *See* notes 103-126, *supra,* and accompanying text.

by denying compensation, of course, particularly in heavily developed urban areas. The extent of the savings is not known. Whatever the figure, it must be reduced in any attempt to evaluate its true impact on state public finance by the reduction in state and local tax receipts caused by the financial stringency of those businesses owning lands adjoining the highway resulting from forcing them to devote capital funds to replace lost lateral support. Had the state shouldered these costs, the private owner's could have devoted more funds to expanding or strengthening their businesses.

VIII. Advance Public Knowledge of Pending Condemnation

A. Present Law

General knowledge or belief that a tract is soon to be acquired by governmental authority often depresses its value. Is the loss in value caused by public knowledge of pending condemnation compensable? The few cases that have considered the question in recent years have usually held the loss non-compensable.[208] Consistently enough, in the one case studied where advance public knowledge caused an increase in value of the tract to be condemned, the increase was included in the compensation.[209] The increase resulted from the owner reopening a retail store that had been closed about four years until the state attempted to purchase the property for highway purposes. The reason given for the holding was that the owner still had the right to make the best use of the property even though he knew the land would be condemned. The circumstances of the reopening were not evidence of bad faith. The decision seems questionable since it apparently was the prospect of condemnation that caused the best use to be a retail store; hence the value created by the store seems a benefit created by the project.[210]

The reasons for denying compensation for losses due to advance knowledge of condemnation include skepticism that the losses were really caused by the public knowledge,[211] a rather arbitrary assertion

208. Dong v. State, 90 Ariz. 148, 367 P.2d 202 (1961); Heimann v. City of Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947); Lord Calvert Theatre, Inc., v. Mayor and City Council of Baltimore, 208 Md. 606, 119 A.2d 415 (1956); Onorato Bros., Inc. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957).

209. State v. Stabb, 226 Ind. 319, 79 N.E.2d 392 (1948).

210. *Id.* at 326, 79 N.E.2d at 395-96.

211. Lord Calvert Theatre, Inc. v. Mayor and City Council of Baltimore, 208 Md. 606, 119 A.2d 415 (1956).

that no damage occurs until the physical condition of the street is changed,[212] and assertion that the harm caused by the advance knowledge was too indefinite, conjectural and general to be a special injury to land.[213] Where the authorization to condemn was a city ordinance, it was suggested that holding the city liable for failing to implement or repeal the ordinance might be an interference with the legislative process.[214] It has also been suggested that inability to attribute delay in acquisition to the fault of the government is a reason for denying compensation.[215]

The logic of one case indicates losses from advance public knowledge of condemnation would be compensable. *State ex rel. Willey* v. *Griggs*[216] tested the constitutionality of a statute declaring the value of property taken in eminent domain should be fixed as of the date immediately preceding the resolution of necessity of acquisition, unless no action to condemn was started within two years following the resolution date—in which case the time for valuing the property was the date of the summons. The statute was found to violate the state constitutional prohibition of taking or damaging property without compensation. The reason was that the court defined taking or damaging to include any infringement on use of property that diminishes its value, and found the resolution of necessity of taking to be such an infringement because after its passage no transaction, appreciation or improvement enhancing the property's value could be compensated. The court thought the effect of the statute was to reduce the possibilities of sale or lease of the property and virtually to prohibit improvements.

By statute, Wisconsin compensates net rental losses incurred from vacancies during the year preceding the taking.[217]

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212. Heimann v. City of Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947).

213. Onorato Bros., Inc. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957).

214. Lord Calvert Theatre, Inc. v. Mayor and City Council of Baltimore, 208 Md. 606, 119 A.2d 415 (1956).

215. Dong v. State, 90 Ariz. 148, 367 P.2d 212 (1961); Lord Calvert Theatre Inc. v. Mayor and City Council of Baltimore, 208 Md. 606, 119 A.2d 415 (1956).

216. 89 Ariz. 70, 358 P.2d 174 (1960).

217. WIS. STAT. § 32.19(4) (1965). The loss is limited to the excess of the average annual rental losses from vacancies during the first four years of the five-year period immediately preceeding the taking. The rental loss compensated must have been caused by the proposed public land acquisition.

B. Commentary

The decisions based on the fault, or lack thereof, of the government in delaying the taking following public knowledge or belief that the taking is pending consider the problem of compensability in the context of tort rather than eminent domain. The rationale of the *Griggs* case is persuasive in its exposition of the manner in which the use of property is circumscribed by the announcement that it is needed for public use. However, it may be difficult to prove precisely when knowledge of the proposed taking became public, considering the frequency with which rumor and more or less reliable inside tips precede an official announcement of a pending project. And what of situations where in fact no acquisition of land occurs? The losses due to advance knowledge are just as real when the knowledge proves false as when it is correct, yet if payment is made for losses stemming from false knowledge, the government could be victimized by owners conniving with rumormongers over whom the government had no control. Apart from these difficulties, there is the further problem of proving that the losses were actually caused by the advance knowledge. One way to meet these difficulties is to place the burden of proving loss and its causation on the claimant, limit the recovery in condemnation of losses due to advance knowledge to situations where the state ultimately acquires an interest in land, and allow recovery in tort of such losses in situations where the state does not acquire an interest in land. Basing governmental liability on tort in the last described situation insures that liability will be found only when the government or its agents has been culpable.

IX. Ostensible Regulation of Land Use by Public Action

A number of cases in the sample grapple with the esoteric distinction between curtailments of land use that government may impose without compensating the landowner and curtailments that are valid only if compensation is made. The test appears to be twofold. One consideration is the severity of the restriction on the landowner compared to the social utility of the restriction—if, balancing these factors, a court concludes the application of the restriction "reasonable," no compensation is necessary.[218] The other consideration is the *bona fides* of the regulation as a control of land use. The regulation must legitimately serve some land planning goal, it must not have been enacted

218. Waite, *The Official Map and the Constitution of Maine,* 15 Maine L. Rev. 3 (1963).

simply to hold land values down in anticipation of later condemnation if the need for compensation is to be avoided.

The sample studied contained only two cases that appear to have involved regulations that did not properly serve a land planning goal. In one,[219] a zoning ordinance had created a residential district adjacent to a highway, the district being only one hundred feet wide measured from the *center line* of the highway. The next zoning district was commercial and 200 feet wide, the next district was industrial and of unspecified width. The state highway commission later condemned only the residential strip for road widening purposes, and a witness testified the residential district was created only in anticipation of the road widening. The decision here described arose from the condemnation. The court indicated the zoning was probably invalid because it was being used as a substitute for eminent domain[220] but found it unnecessary actually to decide the issue. The other case[221] held a statute unconstitutional that provided compensation in condemnation actions was to be assessed as of the date immediately preceding the resolution that acquisition was necessary, unless the condemnation action was not brought within two years of the resolution date, in which case the value was to be determined as of the date of the summons in the condemnation action. The court considered the statute to infringe on the use of property so as to lessen its value, since after passing the resolution that acquisition was necessary no transaction, appreciation or improvement enhancing the property's value could be compensated. Therefore improvements were virtually prohibited. The court concluded the primary purpose of the statute was to condemn land and save the state money, not to regulate land use;[222] compensation had to be assessed as of the date of the summons.

Every other decision in the sample upheld the questioned regulation as a proper use of the police power; therefore no taking had occurred and no compensation was required. Conditions imposed by a city council on the acceptance of a subdivision plat were upheld in one case.[223] The conditions required the subdivider to dedicate a

219. Congressional School of Aeronautics, Inc. v. State Roads Comm'n, 218 Md. 236, 146 A.2d 558 (1958).

220. Zoning that effects a reasonable control of land use is a valid exercise of police power even though it incidentally lowers the value of land condemned shortly thereafter. Kornegay v. City of Richmond, 185 Va. 1013, 41 S.E.2d 45 (1947).

221. State *ex rel.* Willey v. Griggs, 89 Ariz. 70, 358 P.2d 174 (1960).

222. *Id.* at 75, 358 P.2d at 177.

223. Ayres v. City Council of Los Angeles, 224 Cal. 2d 31, 207 P.2d 1 (1949).

strip of land 10 feet wide for the possible future widening of the street it adjoined, restrict another 10-foot strip along the rear of certain lots to planting trees and shrubbery, dedicate the extension of a public street across the subdivision to 80 rather than 60 feet in width, and dedicate a triangular plot to street use, the plot being 12½ feet wide at the base and extending to a point in 75 feet. In sustaining the conditions against the contention that they take property without paying the owner, the court pointed out the city's charter contained no specific limitations on city power and there was no prohibition of the conditions in either the enabling act for subdivision control ordinances, or in such ordinances the city had enacted. In general, conditions on subdivision approval are lawful that are not inconsistent with the enabling act or city ordinances and which are reasonably required by the subdivision type and use as related to the local and neighborhood planning and traffic conditions. The court found dedication and restriction of land strips had been used in other subdivisions in the locality and are part of the subdivision design. The fact they were not in the master plan was not significant; the imposition of the conditions itself is an adoption of the master plan. The subdivider seeks the advantage of subdivision, therefore it is his duty to meet reasonable conditions related to increased traffic. The above considerations overrode the contentions of the subdivider that regardless of the subdivision the city planned to take the land that it required him to dedicate, and for the same purposes; that the benefit of the conditions to the tract and its lot owners was small, whereas to the city the benefit was large; and that therefore the conditions amounted to an exercise of eminent domain requiring compensation to be paid. Conditions on plat approval imposed by the master plan and the subdivision control ordinance have been upheld as valid police regulations, absent any showing that compliance would lower the land's value severely or of bad faith by the planning authorities.[224]

Approval of a street plan under subdivision control ordinance without a public hearing has been held proper,[225] where the proposed streets would not touch the complainants' lots, nor would any conceivable extension of the streets. No property rights of persons owning

224. Krieger v. Planning Comm'n of Howard County, 224 Md. 320, 167 A.2d 885 (1961). The mere fact that the police regulation is imposed by one local government and condemnation is brought by another is not evidence of bad faith. Aycock v. Fulton County, 95 Ga. App. 541, 98 S.E.2d 133 (1957).

225. Feldman v. Star Homes, Inc., 199 Md. 1, 84 A.2d 903 (1951).

land adjoining the subdivision had been taken—the approval at most only designated land for possible future public acquisition.[226]

The validity of a building set-back line indicated on a master plan was easily upheld where set-back lines of a zoning ordinance, whose validity was accepted, were more drastic and would apply in place of that of the master plan.[227] Furthermore, there was no proof that a reasonable return could not be earned on the land under the existing regulations.

Physical changes the city makes in conditions found in the street have not required compensation, where the changes are reasonable and related to the public use of the streets, even though the abutting landowner suffers an economic loss thereby. Thus, no compensation was required when a city removed trees growing in the street in order to lay a sidewalk, the court stating that the city's power to control its streets was paramount to the right of the abutting landowner to grow trees in the street.[228] Another decision upheld city construction of street curbs without compensating the abutting landowner. The curbs prevented vehicles from being parked at right angles to the abutting business property, as they previously had customarily been parked. No compensation was necessary because the making of reasonable parking regulations to deal with traffic conditions was part of the city's police power.[229]

Where the change is not within the street or highway, but along its sides the justices of one New England supreme court were of the opinion when considering the removal of billboards that compensation is required if the condition changed is not a nuisance, but is not required if the condition is.[230] The same justices thought a statute preventing billboards from being erected along a highway in the first place a valid police regulation.[231]

X. Summary of Property and Just Compensation

The study here reported outlines the current, practical meaning of "taking," "property" and "just compensation" as those terms are used in the state law of eminent domain, and highlights the reasons therefor. Considerable difference among the states in the terms' meanings

226. *Compare* State *ex rel* Willey v. Griggs, 89 Ariz. 70, 358 P.2d 174 (1960).
227. Symonds v. Bucklin, 197 F. Supp. 682 (D. Md. 1961).
228. Weibel v. City of Beatrice, 163 Neb. 183, 79 N.W.2d 67 (1956).
229. Hillerege v. City of Scottsbluff, 164 Neb. 560, 83 N.W.2d 76 (1957).
230. Opinion of the Justices, 103 N.H. 268, 169 A.2d 762 (1961).
231. *Id.*

was expected to emerge. Resolution of the differences was hoped to be materially aided by the better judicial reasoning.

The sampling of compensability law analyzed actually shows the difference among the states in basic legal theory, whether created by judges or legislators, are relatively small. Only moderate help in resolving the theoretical differences may be obtained from the judicial reasoning. Application of the theory to the facts does produce some different results in substantially similar fact situations. Such differences appear inevitable. Determining that certain property rights were taken, or other damages sustained which a statute made compensable sometimes is done by a jury, and different juries may reach different conclusions. Judges also may differ in determining whether certain facts fall within one legal rule or another. Is a change of highway grade noncompensable because it is made to improve the public right of safe travel on the highway, or is it compensable because it removes lateral support from adjoining land? On the other hand, certain fact situations have been consistently handled the same way in recent litigation.

The courts that decided the sample cases almost always find no loss of access rights requiring compensation when the access is eliminated by installing structures within the existing right of way, by changing the grade of an existing highway (unless the change significantly restricts the possible uses of roadside land), or when a limited access highway is built where no type of highway had been located. They do find such a loss whenever an existing street is vacated, whenever access rights are explicitly condemned, or whenever a widening strip is acquired for an existing road which then is made limited access and no service road provided.

Moving and realignment expenses are now compensated in most states by judicial decision or statute. Loss of good will and future business profits, as well as frustration of contracts, have all been denied compensation by the courts. A few states have made some statutory provision for paying such expenses but the statutes usually have been narrowly construed by the courts. Most states deny compensation for loss of business or temporary impairment of access during construction, except for losses caused by state acts not necessary to the road work.

Only one case involving loss of expenditures made before condemnation having been considered, no comment regarding a "general rule" can be made. As to expenses after condemnation, compensation usually is denied, the courts being skeptical the expenses actually

will be incurred and, if incurred, will be limited to those necessary to eliminate the harm in question. Statutory provision is made in Wisconsin for paying certain post condemnation expenses, but only after they are actually incurred and the owner claims for them.

Only a relatively few cases have been decided in recent years involving certain harms. But when the issues have arisen, harm caused by flooding or erosion due to diversion of water usually has been compensated, as has harm resulting from loss of light, air and view. As to lateral support lost because of highway construction the government has been treated as if it were a private land developer in determining liability. And losses from advance public knowledge of pending condemnation have not been compensated. A Wisconsin statute allows recovery of one such loss, net rental loss, to a limited extent—the rent must be lost by vacancies during the year preceding the taking.

The court decisions examined usually have found the expenses of conducting litigation outside the constitutional concept of just compensation. But the compensability of these expenses is largely determined by statute, with a fair diversity of detail appearing among the various states. On the other hand, courts usually find the constitution requires interest to be paid on the award from the time of taking until the time of judgment except as to sums paid into court if the landowner can withdraw them without impairing his right to litigate the issue of just compensation. As to the excepted portions, interest stops when the payment into court occurs. Statutory provisions create some differences among the states but perhaps to a lesser extent than has occurred with litigation expenses.

Only one case considered unintended interference with property, hence, as is true of pre-condemnation expenses, no general rule of compensability can be stated. Nor do generalizations seem feasible based on the very diverse other items of loss or damage.

The courts when justifying compensability decisions often talk in terms of whether the private loss sustained was of property or not. Most states have so firmly concluded that access rights are property the issue no longer is discussed in the access cases. Instead the issue is whether the state actions in question have so limited access rights as to amount to a taking. Sometimes, although the degree of limitation is sufficiently severe to amount to a taking, the manner in which the limitation is achieved prevents it from being treated so. Thus the government may change the highway grade, erect curbs or other physi-

cal structures within an already existing highway and often will not be required to pay for the harm thereby caused the landowner. In effect the courts decide in such instances that the landowner's property does not include the right to be free of such harms caused by government in the course of improving its highway right of way. Putting it another way, the public right to safe passage along the highway is paramount to the private rights of the abutting landowner. The reasoning of the cases is not usually explicit in stating criteria for fixing the demarcation between public and private rights. Perhaps the primary factors considered are the judges' views of the dollar magnitude of public liability if freedom from a certain harm is deemed to be private property, and of attitudes current in society at the time of the decision regarding what is "proper" government conduct toward landowners. For example, government acquisition of possessory rights to a tract is what perhaps most non-lawyers think of as a taking, whereas the layman may consider injuries incidentally caused neighboring land by governmental activity on another tract to be indistinguishable from similar injuries caused by private persons, and therefore government liability might be expected to be the same as that of the private actor. Similarly, inability to distinguish the condemnee from private litigants has led some courts to deny compensation for litigation expenses, since the private litigants are not compensated for such costs. Sometimes compensation has been denied because the damages sustained were deemed too speculative for proof. This reason figures particularly in some cases denying recovery for lost good will and future business profits, for expenses incurred after condemnation, and for losses due to advance public knowledge of impending condemnation. Ideas of basic fairness have led to denying compensation for costs incurred by the landowner in reaping benefits created by the highway project, and, occasionally, to compensating litigation expenses thrust on the landowner by the governmental decision to condemn.

XI. Suggestions for Statutory Changes in the Law of Compensability

The existing law of compensability in eminent domain appears inequitable in several respects, as to which corrective suggestions are listed below for legislative action. Reasons for the suggestions are elaborated in many of the commentaries discussed above.

A. Access Rights

Compensability of lost access rights should hinge on the remaining utility of the land to which they pertained. Although access rights are

considered an easement in the highway, which suggests a property interest separate from that held in the abutting land, the easement invariably belongs to the abutting owner and is important to him only in the increased utility it gives the abutting land. Therefore loss of access rights should be treated as a form of severance damage, not as a loss of property distinct from the property in the abutting tract. In determining the extent of severance damages a tract sustained by loss of access to a particular highway, access that may remain to another road should also be considered. Such an approach sharpens the focus on effects sustained by the abutting tract and reduces the possibility of compensating the owner for lost opportunities to benefit from expected future rises in land value rather than for loss of land utility, either existing or potential, under the access conditions that prevailed before and without regard to the highway changes to be effected. If land utility has been decreased, compensation should be equally available whether the decrease was caused by government activity inside or outside an existing right of way since the landowner has been similarly affected.

Loss of land utility is hard to separate from loss of economic value. However, while society is unprepared to compensate for all net economic losses caused by constructing public improvements, the distinction remains useful. Rights to use land in various ways, free from interference by strangers, are the crux of the property concept in law. And although the content of property may be somewhat different when considering a private person's property in relation to interference by government than in relation to interference by other private persons,[232] still it is "property" the constitutions forbid government to confiscate, not economic values.

If the suggestion to require by statute that loss of access rights be treated as a type of severance damage is not adopted, the case law arising from certain fact situations should be codified, since the courts almost always treat these situations the same way.[233] The statute should provide that access rights are lost, requiring compensation, when an existing street is vacated, or a widening strip is acquired for an existing road which then is made limited access and no service road is provided. Conversely, the statute should make clear that no access

232. Beuscher and Delogu, *Land Use Controls,* WISCONSIN DEVELOPMENT SERIES, STATE OF WISCONSIN, DEPT. OF RESOURCE DEVELOPMENT (1966), at V-5; Kratovil and Harrison, *Eminent Domain—Policy and Concept,* 42 CALIF. L. REV. 596, 602-04 (1954).

233. *See* pp. 91-94 *supra.*

rights are lost requiring compensation when the access is wiped out by structures built within an existing right of way, or when a limited access highway is built where no road has been located.

B. Change of Grade

The approach to compensability for lost access rights appears applicable to changes of grade as well. The abutting owner is only affected by physical changes within the existing right of way if, by shutting off access, light and air, removing lateral support, or the like, they affect the utility of the abutting land. The alternative suggested of codifying the case law of access rights compensation in some situations is an appropriate alternative when considering compensation for change of grade, too. The codifying statute should provide that changing the grade of an existing highway is not a taking requiring compensation, unless the landowner proves the change significantly restricts the possible uses of his land.

C. Expenses of Moving or Realigning Property

Since moving or realigning expenses are clearly incurred because of the government action, it seems a reasonable sum should be included in the condemnation award to cover such expenses. Maximum dollar amounts payable for these items may be fixed by statute to enable highway departments more accurately to predict right of way costs. Any such statutory provisions enacted must periodically be overhauled to remain abreast of current prices for moving or realigning property. There is some indication that payment for these expenses tends to reduce the overall cost of right of way acquisition since it creates good will with the landowner, so much so that he is more amenable to a negotiated purchase of his land.[234] Paying moving expenses also tends to reduce litigation of the scope of the fixture concept.[235]

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234. This view was expressed by several persons attending a meeting with Professor Richard U. Ratcliff, Mr. Dean T. Massey, and the author at Madison, Wisconsin, December 2 and 3, 1965. The meeting was held to discuss problems of appraisal, compensability, and evidence in eminent domain proceedings. In addition to Professors Ratcliff and Waite and Mr. Massey, the conference was attended by Professor Orrin Helstad, Wisconsin Law School; Joseph D. Buscher, Special Assistant Attorney General of Maryland; John P. Holloway, then Chief Highway Counsel and Assistant Attorney General, Colorado; Delbert W. Johnson, Assistant Attorney General, Washington; Leonard I. Lindas, Administrator-Legal and Right-of-Way, Nevada Highway Department; Herman Wolther, M.A.I., independent appraiser, Chicago; Lester Mozier, Chief Right of Way Agent, Mary-

D. Loss of Business or Temporary Impairment of Access During Construction

Recovery of such losses should be allowed to the extent proved by the landowner in a suit brought by the landowner within a specified time after the construction is completed. The suggestions applicable to permanent loss of access apply to temporary loss as well. As for lost business profits, it is true a particular level of profits is not property, but losses in profit the landowner proved were caused by the construction are unlikely to have occurred but for the construction, which creates a moral claim on government to pay. They may even indicate a change in the highest and best use during construction. Since only businesses existing before the construction occurs will be involved, the highway department will be able to estimate in advance of construction the magnitude of liability that will be incurred for this element of damage. There being no land permanently taken, there is no hazard that lost profits have already been included in payment for the land. The state should be allowed to prove enhancement in land value or in business profits created by the highway construction, the amount of any proved enhancement to be set off against the losses the landowner proves.

E. Loss of Past Expenditures

Any reasonable past expenditures specifically related to improving the particular property condemned should be compensated to the extent the object of the expenditure is not usable on other land. The improvement would itself have commanded compensation had it been completed when the taking occurred. Again, recovery should be possible only in a suit brought by the landowner within a specified time after the condemnor takes possession. The landowner should have to prove both the expenditure and its lack of applicability to other land.

F. Expenses after Condemnation

Provision should be made for recovery of such expenses by landowners filing claims therefor with the proper highway department after the expenses were incurred. Recovery should be limited to the reasonable costs of an improvement likely to remedy the harm caused by the public project. Reasonable, post-condemnation expenses are

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land; E. R. Lorens, Engineer of Right of Way, Minnesota Highway Dep't; Ross D. Netherton, Counsel for Legal Research, Highway Research Board.

235. *Id.*

akin to severance damages in the case of partial takings, and appear to form part of the value of a tract completely taken since ownership of the tract allows the expenses to be avoided. Compensation for the cost of a new building and site, or of new residential housing should be limited to some fraction—one-half, say—of the difference between the costs incurred for the facilities and the compensation previously received for the land taken. Otherwise, the owner is better off after the taking than before because of having new facilities rather than old. It may be noted that compensating post-condemnation expenses in the manner suggested will substantially ease the plight of persons who find payments for their homes taken in condemnation insufficient to enable them to obtain comparable housing.

G. Light, Air and View; Lateral Support; Advance Public Knowledge of Impending Condemnation

Owners should be allowed to prove losses of light, air or view, or of lateral support their land suffered because of highway construction, the proof to be made within a stated period following project completion in a claim filed with the highway department. Recovery should be allowed for lost lateral support whether the land that suffered the loss was improved or not, since to do otherwise tends to deter further improvements.

Owners should be allowed similarly to prove losses from advance public knowledge of impending condemnation, but only after the government actually acquires an interest in land. Before that landowners might be allowed to attempt recovery in tort on a theory of negligence.

STATUTORY COMMENTS